IN THE

Supreme Court of the United States

OCTOBER TERM 1947

No. 79

THE UNITED STATES OF AMERICA,

Appellant,

v.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, *et al.*,

Appellees.

No. 80

LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., *et al.*,

Appellants,

v.

THE UNITED STATES OF AMERICA,

Appellee.

DIRECT APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF APPELLEE-APPELLANT LOEW'S INCORPORATED

JOHN W. DAVIS,
J. ROBERT RUBIN,
Attorneys for Loew's Incorporated

S. HAZARD GILLESPIE, JR.,
BENJAMIN MELNIKER,
Of Counsel.

February 2, 1948.

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OPINION AND JUDGMENT BELOW

The opinion of the District Court is reported in 66 F. Supp. 323 (1946). The opinion and judgment are printed, commencing at R. 3504 and R. 3694, respectively.

JURISDICTION AND STATUTES INVOLVED

The judgment of the District Court was entered December 31, 1946 (R. 3694). The petition for appeal in No. 79 was filed February 18, 1947, and was granted by the District Court February 21, 1947 (R. 3720, 3725). The petition for appeal in No. 80 was filed in and granted by the District Court February 26, 1947 (R. 3726, 3737). Probable jurisdiction was noted by this court June 21, 1947 (R. 3840). The jurisdiction of this court is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272; 15 U. S. C. § 29), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C. § 345).

The statute under which this case was prosecuted was the Sherman Anti-Trust Act (Sections 1, 2 and 4, Act of July 2, 1890, 26 Stat. 209, as amended; 15 U. S. C. §§ 1, 2 and 4).

Also directly involved is the Copyright Act of March 4, 1909 (35 Stat. Part 1, pp. 1075-1088), as amended August 24, 1912 (37 Stat. Part 1, pp. 488-490), U. S. C. Title 17.

The pertinent provisions of the Sherman Anti-Trust Act and of the Copyright Act are set forth as Appendix I to this brief.

STATEMENT OF THE CASE

A. Nature of the Action, Description of Loew's Incorporated, and the Proceedings Below.

Nature of the Action

This action was commenced July 20, 1938 in the United States District Court for the Southern District of New

York. The original petition charged concerted monopolization of the domestic motion picture industry by eight of the principal companies therein. Five of these companies (Fox, Loew's, Paramount, RKO and Warner) were engaged in the production, distribution and exhibition of motion pictures. Two of the eight companies (Columbia and Universal) were engaged in the production and distribution of motion pictures, and United Artists was engaged solely in distribution.

In addition to injunctive prohibition against certain trade practices of the industry, the complaint demanded that Loew's and the other four defendants, engaged in production, distribution and exhibition, be permanently debarred from the exhibition field by divestiture of their theatres.

Description of Loew's Incorporated

Loew's Incorporated (a Delaware corporation) was organized in 1919 to carry on the vaudeville and motion picture enterprises, which the late Marcus Loew had previously established and developed. For more than 20 years the company has been engaged in the production and distribution of motion picture films, known as Metro-Goldwyn-Mayer pictures. In addition, through the operation of theatres, it has engaged in the exhibition of its own pictures and those of other producers (for a brief history of Loew's, see R. 1838-9).

In both ownership and management Loew's is entirely free from any connection with any of the co-defendants or any form of control by any of them. None of these co-defendants owns any stock or any form of security in

Loew's. There are no directors or officers in common. Loew's owns no stock or any other securities in any co-defendant; nor do any of Loew's officers or directors. All of this Government's counsel concedes.[1] The dissociation of Loew's from the co-defendants could not be more complete.

In producing Metro-Goldwyn-Mayer pictures Loew's has its own actors, buys its own stage material, employs its own writers, directors and other needed operators. While from time to time it lends or borrows stars and stage accessories to or from other producers in the production colony, the District Court found that there exists "active competition" among all the defendants and others in the *production* of motion pictures (Find. 59; R. 3670).

Loew's distribution of Metro-Goldwyn-Mayer pictures is carried on by 32 branch offices or exchanges, which it maintains and operates separately and apart from any other defendant in this case. These exchanges are located in the more important cities throughout the United States and serve to distribute the prints of films for use in the theatres in the area served by each exchange. A feature picture is usually prepared in 300 to 350 positive prints, which are licensed to anywhere from 7,000 to 15,000 theatres (R. 415; Exh. L-4). In the season 1943-44, Loew's distributed 33 features,[2] amounting to approximately 180,000 transactions

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[1] Government's counsel at R. 215-216:

> "* * * as between the eight groups of defendants, I think it is quite true that *there are no common officers; there is no common stock control*, although it may be, of course, that executives or officials of one or more of them hold some listed stock in the others." But as to those, "We do not attach any significance to them."

All emphasis in this brief has been supplied.

[2] Pursuant to arrangement between the parties, the 1943-44 season was taken as a typical one for the purpose of assembling pertinent statistical information such as the number of features

which were carried out by distribution field forces costing Loew's an average of $115,000 *per week* (R. 437-444).

Loew's engages in exhibition of motion pictures to the extent of operating 131 theatres throughout the United States, where it shows films produced by itself and others (Exh. L-12).[1]

In no place where Loew's operates does it have a "closed town," or even a first-run monopoly. On the contrary, in every single city where it has a theatre there are other competing theatres on first-run as well as subsequent runs (Find. 149; R. 3689; Appendices II and III; Exh. L-15).

Loew's 131 theatres are located in 42 of the larger cities across the United States and represent 7/1000 of the 18,076 theatres operating in the United States on January 1, 1945 (Appendices II and III; Find. 145, R. 3688).

There is absolutely no evidence that the 131 theatres operated by Loew's were acquired in any other than a normal, lawfull manner or that they were acquired by purchase from a competitor, or that Loew's ever engaged in any predatory practice against any competitor, or even that any competitor of Loew's ever went out of business.

As long ago as 1932 Loew's was operating 122 theatres so that *during the thirteen years preceding the hearings in this litigation the theatres operated by Loew's increased by only 9* (Exh. L-12). During this same period the total

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distributed by the defendants, film revenue, etc. Thus, all references in this brief to the amount of product used by a particular theatre, or licensed by a particular distributor, relate to this season.

[1] This does not include 11 theatres operated by Buffalo Theatres Inc., for which Loew's does the buying and booking of films. We do not regard these theatres as actual Loew-operated theatres, but, to avoid controversy, on all revenue and product charts introduced in evidence by Loew's these theatres were included.

theatres operating in the United States *increased* by 5,471 (Exh. L-12; cf. Find. 145, R. 3688), an increase of 600 to 1 of Loew's.

Loew's proprietary interest in theatres, either through ownership or leasehold, had a book value apportionable to Loew's interest of approximately $69,000,000 as of August 31, 1944 and an assessed valuation apportionable to Loew's interest of about $57,000,000 (R. 1839).

Proceedings Below

Loew's, along with the other defendants, filed answer to the Government's petition, denying the material allegations thereof, and the case came on for trial on June 1, 1940. Prior to the taking of any testimony, negotiations were begun to determine whether the case could be disposed of by consent decree. After several months negotiation, an agreement for a consent decree was reached, and on November 14, 1940, an amended and supplemental complaint was filed (R. 3137). Loew's as well as the other defendants again answered (R. 3217) and on November 20, 1940, the District Court entered a decree on consent of the Government and the defendants Fox, Loew's, Paramount, RKO and Warner. The defendants United Artists, Universal and Columbia did not join in the consent and were not subject to this decree.

By the consent decree each of the defendants mentioned undertook to discontinue certain trade practices, hereafter considered in detail, and for a period of three years agreed not to enter "upon a *general program* of expanding its theatre holdings" (R. 3387). At the same time, however, it was specifically provided that nothing in this con-

sent decree should prevent any defendant "from acquiring theatres or interests therein to protect its investment or its competitive position or for ordinary purpose of its business" (R. 3387). Each of these defendants also undertook to report immediately to the Department of Justice the acquisition by it of any additional theatre or theatres (R. 3386). The Government, on its part, undertook that for a period of three years it would not seek to divorce the production or distribution of motion pictures from their exhibition (R. 3395).

In addition, the consent decree provided, as prayed in the amended and supplemental complaint, for the establishment of a nation-wide system of arbitration tribunals to deal with certain trade disputes inherent in distributing and exhibiting motion pictures (R. 3395 *et seq.*).

Finally, the District Court retained jurisdiction of the action for the purpose, among other things, of enabling any of the parties to apply to the court after three years for modification of its decree (R. 3400).

Such an application was filed by the Government August 7, 1944. It sought modification, among other things, of the matters made subject to arbitration by the consent decree (R. 3414), and for complete divorcement by each of the defendants Fox, Loew's, Paramount, RKO and Warner, of their exhibition business from their production and distribution business (R. 3418).

This application for modification was noticed for hearing on December 5, 1944, and after a series of conferences with the court, the date for hearing was set for October 8, 1945. Prior thereto on June 13, 1945, the Government filed an application, pursuant to the Expediting Act, 15 U. S. C. Section 28, for the appointment of a special three

judge expediting court. Such court was duly constituted on June 16, 1945, with Augustus N. Hand, Circuit Judge, Henry W. Goddard and John Bright, District Judges. Hearings commenced on October 8, 1945 and continued through November 20, 1945.

The court rendered its opinion on June 11, 1946 (R. 3504) and its judgment and findings of fact and conclusions of law (together with a supplemental memorandum) on December 31, 1946 (R. 3694, 3659, and 3702). Thereafter certain of the defendants, including Loew's, moved to amend the judgment in several respects, and to amend one of the conclusions of law. This motion, except in a minor particular immaterial to this appeal, was denied by order entered February 11, 1947 (R. 3719).

It is from certain provisions of the judgment entered December 31, 1946, and the findings and conclusions, as well as the denial of the motion to amend, that the Government and the various defendants have appealed to this Court. On April 7, 1947, this Court granted a stay of certain provisions of the judgment of December 31, 1946, "pending the final disposition of the case by this court."

B. The Government's Contentions Below and the Judgment of the District Court with respect thereto.

The Government's Contentions Below and the Judgment of the District Court with Respect to Monopoly of Production.

The amended and supplemental complaint contains elaborate charges that Loew's and other defendants combined and conspired to unreasonably restrain and monopolize pro-

duction of motion pictures, in violation of Sections 1 and 2 of the Sherman Act (26 Stat. 209 (1890), as amended 50 Stat. 693 (1937), 15 U. S. C. §§ 1, 2; Appendix I).

More specifically, it was claimed that Loew's and other defendants loaned and exchanged production personnel and costly equipment on non-competitive terms and excluded independent producers from access to that personnel and property (R. 3184). At the trial the Government failed to substantiate these charges and finally on questioning by the court formally abandoned the charges as alleged (R. 1952-3).[1]

With regard to production the District Court made the following findings (R. 3670):

> "59. There exists active competition among the defendants and others in the production of motion pictures.
>
> 60. None of the defendants has monopolized or attempted to monopolize or contracted or combined or conspired to monopolize or to restrain trade or commerce in any part of the business of producing motion pictures."

In the judgment the District Court provided (Section I, 1; R. 3695):

> "The complaint is also dismissed as to all claims made against the remaining defendants herein based

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[1] "Judge Goddard: Do you claim there is a monopoly in production? I don't think I understand your position.
Mr. Wright: I don't think we do.
Judge Goddard: I beg your pardon?
Mr. Wright: No, we do not. * * *" (R. 1952-3).
See also R. 384-389.

upon their acts as producers, whether as individuals or in conjunction with others."

The Government's Contentions Below with respect to MONOPOLY OF EXHIBITION AND DISTRIBUTION.

Motion pictures reach the public through successive exhibitions—the first exhibition of a picture in a particular area being known as the *first-run*, the next subsequent, the *second-run*, and so on (Find. 1, R. 3660-1). All feature motion pictures are *licensed* by the distributor to the theatre operator exhibiting them. Although the expression "selling a picture" is frequently used in distribution parlance, the transaction is always a license under copyright and not a sale (Find. 61; R. 3670). The film or print is physically returned to the distributor after each engagement (R. 415, 531). The contract whereby a distributor licenses a theatre to exhibit a picture on a particular run usually stipulates a time which must elapse before that feature may again be shown in the particular competitive area or in another specified competitive theatre. This agreed interval of time is known as *clearance* (Find. 1, R. 3660).

The Government charged in the lower court that Loew's and the other four distributors who own theatres—Fox, Paramount, RKO and Warner—have a nation-wide monopoly of exhibition and distribution of motion pictures, which they have achieved and maintain by practices as to *run, clearance* and *theatre admission prices*, in violation of the Sherman Law.

The nation-wide monopoly of exhibition claimed by the Government is predicated on the fact that the number of

first-run theatres operated by Fox, by Loew's, by Paramount, by RKO and by Warner, *if aggregated,* comprise 70% of the first-run theatres in major cities across the United States; i.e., the 92 cities with over 100,000 population (Find. 148; R. 3688).

The existence of the claimed monopoly of distribution is predicated upon the *aggregating* of the *revenues* that these five companies receive as distributors from the theatres of each of them as an exhibitor. Thus, when the film rental paid by Loew's theatres to Fox, to *Loew's itself,* to Paramount, to RKO and to Warner, as distributors, is *aggregated,* the five receive 71% of the total film rental paid by the Loew's theatres; and the same is true with respect to the theatres of each of the other four, but in increasing percentages, up to 81% (Find. 127; R. 3685). However, in making up the 71% received by the five from Loew's theatres, 47 of that 71% is what Loew's as a distributor itself received from its own theatres, only the balance of 24% going to the other four producer-exhibitors (Find. 135; R. 3687).

In justification of thus *aggregating* the defendants' theatres and thus *aggregating* their revenues, and treating these five companies collectively, the Government advanced the following contentions:

— Each of these five producer-exhibitors, in distributing its pictures has the first-run of those pictures in its own theatres, but in localities where it has no theatre, it licenses the *first-run* privilege to another producer-exhibitor. When the latter occurs, Government's counsel terms the license a *cross-license* or a *diagonal-license,* alleging that the producer-exhibitor has licensed another producer-exhibitor, rather than an independent exhibitor, pursuant to a

nationwide scheme whereby the producer-exhibitor in turn will obtain *first-run* where it operates a theatre (Amended and Supplemental Complaint, Pars. 150 and 151; R. 3192; Government Brief in District Court, p. 20).

— In addition to having the first-run of their features in their own or in each other's theatres, the defendants, as distributors, according to Government's counsel, grant to those theatres excessive clearance or protection before the feature can next be exhibited in a competing theatre, thus impelling more of the theatre-going public to attend at the more profitable first-run. The distributor does this in return for similar treatment where it operates a first-run theatre (Amended and Supplemental Complaint, Pars. 125, 130, and 149(c); R. 3178, 3180 and 3186).

— It is the distributor's practice to include in license contracts a provision that the theatre exhibiting the feature will not charge less than a specified admission price during the exhibition of the feature licensed. According to Government's counsel, subsequent run exhibitors are thus prevented from reducing their admission prices, and the competition which they might otherwise give to the first-run theatre of a producer-exhibitor is also restricted (Amended and Supplemental Complaint, Pars. 130 and 149(d); R. 3183 and 3187).

In addition to the charges just outlined, upon which the Government predicated its right to *aggregate* the five defendants' theatres and revenues, counsel took the position at the hearings that clearance *per se* was unreasonably

restrictive of competition and violated the Sherman Act (R. 2572, 2591-9). This was a position directly opposed to that which Government's counsel had taken at the time of the consent decree. That decree, by agreement of the Government and the five producer-exhibitors, provided (R. 3380):

> "It is recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures."

The Judgment Below with Respect to MONOPOLY OF EXHIBITION AND DISTRIBUTION.

The District Court refused to adopt the theory of Government's counsel that the five defendants Fox, Loew's, Paramount, RKO and Warner, as producers and as exhibitors have engaged in a mutual interchange or conditioning of first-run privileges. With this, the key to *aggregation,* gone, the charges of monopolization, built upon it, likewise had to go. And the lower court held (Opinion, R. 3553):

> "The five major defendants cannot be treated *collectively* so as to establish claims of general monopolization in exhibition."

Furthermore, the District Court did not accept the theory of Government's counsel that the defendant distributors had achieved a monopoly of distribution. Said the court (Opinion, R. 3554):

> "Outside the limits of the trade practices and agreements which we have found to violate the anti-trust

> laws and which will under the final decree be abolished, *there is general competition among all the defendants as well as between them and independent distributors* for the exhibition of their various pictures."

In addition, the lower court refused to hold that clearance is illegal *per se*. On the contrary, it affirmatively found (R. 3674):

> "78. Clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures. The practice is of proved utility in the motion picture industry and necessary for the reasonable conduct of the business."

However, the District Court did find that all eight of the defendants engaged in distribution, aided particularly by those five also engaged in exhibition, had combined and conspired by uniform action and acquiescence to create a rigid nation-wide system of runs, clearances and admission prices in violation of the Sherman Act (Finds. 81-84; R. 3674).

It found, in addition, that all eight distributors "by the fixing of minimum prices" to be charged in subsequent run theatres attempt to give the prior-run exhibitors as near a monopoly of the patronage as possible, also a violation of the Sherman Act. (Find. 72; R. 3672.)

To remedy the condition resulting from agreement as to minimum theatre admission prices, the court prohibited henceforth the inclusion in license agreements of any provision as to the minimum price which a theatre might charge (Judgment, II, 1; R. 3695).

To remedy the claim of excessive clearance, the lower court enjoined each of the eight defendants engaged in dis-

tribution from granting *any clearance* between theatres not in substantial competition and from granting or enforcing any clearance against theatres in competition "in excess of what is reasonably necessary to protect the licensee in the run granted."[1] It was further provided that whenever any clearance is attacked as not legal under the provisions of the decree "the burden shall be upon the distributor to sustain the legality thereof" (Judgment, II, 3, 4; R. 3695).

The District Court likewise took affirmative steps to eradicate any fixed condition as to run positions; that is, to put an end to the prior-run position which any theatre might possess by reason of conditions other than payment of highest film rental (e.g., favoring an "old customer" over a newcomer with a superior theatre, or favoring an "affiliated" theatre over that of an independent). The judgment prohibits each distributor from arbitrarily refusing the demand of any exhibitor, to license a feature to him for exhibition on a run selected by the exhibitor, instead of licensing it to another competing exhibitor. The only exemption granted to a distributor is in the case of his own product in his own theatre (Judgment, II, 9; R. 3698). In addition, the judgment provides for picture by picture and theatre by theatre licensing, as well as a detailed procedure for so-called "competitive bidding" between competing exhibitors who may elect to use that procedure (Judgment, II, 8; R. 3696; see also Supplemental Memorandum, R. 3702).[2]

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[1]Loew's has not appealed from the injunction against granting clearance between theatres not in substantial competition and from granting or enforcing any clearance against theatres in competition "in excess of what is reasonably necessary to protect the licensee in the run granted" (Judgment, II, 4; R. 3695).

[2]Loew's has not appealed from either paragraph 8 or paragraph 9 of section II of the judgment.

The Government's Contentions Below and the Judgment of the District Court with Respect to BLOCK-BOOKING, MASTER AGREEMENTS, FRANCHISES, FORMULA DEALS *and* "POOLING" AGREEMENTS.

So far as block-booking,[1] franchises,[2] master agreements,[3] and formula deals[4] are concerned, the Government claimed and the District Court found that these methods of licensing by their nature unreasonably restrain trade. All four of these practices are prohibited henceforth by the judgment (Section II, 5, 6 and 7; R. 3696). With respect to formula deals the District Court found as to Loew's (R. 3675):

> "87. Loew's is not, and never has been, a party either as a distributor or as an exhibitor, to any 'formula deal' license agreements."

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[1]The practice of licensing, or offering for license, one feature, or group of features, upon condition that the exhibitor shall also license another feature or group of features released by the distributor during a given period (Find. 1, R. 3659).

[2]A licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of features released by one distributor during the entire period of the agreement (Find. 1, R. 3660).

[3]A licensing agreement, also known as a "blanket deal", covering the exhibition of features in a number of theatres, usually comprising a circuit (Find. 1, R. 3660).

[4]A licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross (Find. 1, R. 3660).

As these particular trade practices here mentioned have been relatively unimportant to Loew's distribution (see Finds. 90, 94; R. 3675, 3676), it has taken no appeal with regard to the prohibition against block-booking, franchises, master agreements or formula deals.

In addition to these trade practices, the Government attacked certain agreements known as "pooling agreements", which were made in limited instances by the exhibitor defendants with each other or with an independent, by which given theatres in a particular city normally in competition with each other, were operated as a unit, or most of their business policies collectively determined by a joint committee or by one of the exhibitors. These agreements also provided for division of profits of the "pooled" theatres among the exhibitors according to preagreed percentages or otherwise (Find. 112, R. 3682).

The District Court found the "pooling agreements" to be illegal (Concl. of Law, No. 9 (a); R. 3693) and decreed the dissolution of all such agreements by not later than June 30, 1947 (Judgment, III (2), R. 3698; IX, R. 3701).

The defendant Loew's has carried out the dissolution of the only two pooling agreements to which it was a party at the time of the judgment, and has taken no appeal with regard to the provision of the judgment prohibiting pooling agreements.

The Government's Contentions Below with Respect to THEATRE DIVESTITURE.

At the time of the hearings in the District Court, the Government demanded divorcement of theatre operation from production and distribution on three grounds:

First, each of the defendants engaged in production and distribution, who also operates theatres, is individually an illegal combination, that can only be eliminated by divorcement.

Second, the five defendants, engaged in production and distribution, who also operate theatres, have collectively achieved a monopoly of exhibition, that can only be eliminated by divorcement.

Third, the illegal trade practices engaged in by the defendants can only be remedied by divorcement.

The Judgment Below with Respect to THEATRE DIVESTITURE.

The District Court denied divorcement of exhibition from distribution and production.

As to the first ground advanced by Government's counsel (i.e. that each of the producer-exhibitors, individually considered, is an illegal combination) the court stated (Opinion, R. 3553-4):

> "Moreover, there is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly, as was the case in *Standard Oil Co. v. United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106, and *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (C. C. A. 2)."
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> * * * * *
>
> "Each defendant had a right to build and to own theatres and to exhibit pictures in them, and it takes greater proof than that each of them possessed

great financial strength, many theatres, and exhibited the greater number of first-runs to deprive it of the ordinary rights of ownership."

As to the second ground (i.e., that the five defendants, collectively, have achieved a monopoly of exhibition that can only be eliminated by divorcement) the District Court held that these five defendants could not be "treated collectively so as to establish claims of general monopolization in exhibition" (Opinion, R. 3554).

As to the third ground (i.e., that divorcement is the only remedy for the illegal trade practices claimed by the Government), the District Court found (R. 3690):

> "154. The illegalities and restraints herein found, are not in the ownership of many or most of the best theatres by the producer-distributors, but in admission price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals, master agreements, franchises, block-booking, pooling agreements and certain discriminations among licensees between defendants and independents. These practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five exhibitor defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited.
>
> * * * * *
>
> "156. Total divestiture would not remedy the price-fixing, systems of clearance, formula deals, master agreements and franchises, block-booking, pooling agreements and the other practices which have been found unreasonably to restrict competition."

While the District Court refused divorcement as demanded by the Government, it did strike down certain forms of the defendants' interests in theatres as violative of the Sherman Law. The judgment of the District Court (Section III (5); R. 3699) requires that all defendants put an end to all joint interests in theatres with either a defendant or an independent, on the theory that such joint interests eliminate putative competition between the defendant and the other operator who otherwise would be in a position to operate theatres independently[1] (R. 3556).

The District Court in its opinion (R. 3562) took the position that each of the exhibitor-defendants should be prohibited from expanding its theatre holdings, except *"to protect its investment, or in order to enter a competitive field."* In the latter case, the acquisition was to be approved by the court after due application. Although no further testimony or proof of any kind was thereafter taken, the judgment entered by the court imposed an absolute prohibition against any further growth without either of these exceptions previously authorized (Judgment, III, (6); R. 3698, 3700).

The Government's Contention Below and the Judgment of the District Court with Respect to a Ban on Producer-Exhibitors' Licensing Each Other's Product.

After the District Court had rendered its opinion, counsel for the Government made formal demand for the first

[1]Interests of less than 5% and more than 95% were not condemned—the joint character of the ownership being so small as to be inconsequential (R. 3549).

time for a prohibition against a producer-exhibitor's licensing for exhibition in its theatre the product of another producer-exhibitor (*cf.* R. 2568-70). This formal demand was contained in a proposed judgment submitted by counsel for the Government, which judgment asked that the producer-exhibitor defendants be enjoined and restrained (R. 3601):

> "8. From licensing for exhibition in any theatre owned or controlled by it films distributed or produced by another defendant named in this section which is not affiliated with it, for a period commencing one year after the entry of this decree and continuing for a period of not less than ten years. At the conclusion of said period, any party may move to modify this provision in any manner which the facts then appearing to the Court may warrant."

The District Court declined to grant this relief.

SPECIFICATION OF ERRORS, STATEMENT OF ISSUES, AND SUMMARY OF ARGUMENT

There are six appeals. Loew's is a party only to the Government's Appeal, No. 79, as appellee, and to No. 80 in which Loew's is one of four appellants. This brief presents Loew's position on these two appeals in the order in which the appeals were filed. Accordingly, Loew's argument as appellee precedes its argument as appellant.

On Appeal No. 79 the Government, as appellant, by its assignments of errors (R. 3721, et seq.), raises "four main questions", which its Statement as to Jurisdiction states as follows:

"*First*, accepting the expediting court's findings as to the extent and nature of the violations involved in their entirety, it erred as a matter of law in failing to enter a judgment which dealt adequately with these violations.

Second, the court erred as a matter of law in concluding that the major defendants [Fox, Loew's, Paramount, RKO and Warner] had not actually achieved a monopoly in exhibition, either singly or collectively and that all of the defendants had not actually collectively achieved a monopoly of distribution, in violation of Section 2 of the Sherman Act.

Third, the court erred as a matter of law in concluding that any of the defendants may make a valid clearance agreement for the purpose of protecting any exhibitor from competition.

Fourth, the court upon proper findings as to the legal consequences of the defendants' violations, should have ordered the ultimate divorcement of the major defendants' theatre holdings from their distribution and production activities and should have restrained them from licensing films for exhibition in each other's theatres while such relief is being effectuated. It should also have enjoined all of the defendants from continuing to make clearance agreements."

Points I, II and III of this brief present Loew's response to these contentions of the Government. Thus, Point I deals with the Government's claim that the court below should have found that the defendants had achieved a monopoly of exhibition and distribution. Point II presents Loew's position with respect to the Government's demand for divestiture of the defendants' theatre properties and exhibition business and Loew's position as to the

Government's demand that pending divorcement each of the defendants, Fox, Paramount, Loew's, RKO and Warner, be prohibited from licensing its features to a theatre which is owned or operated by any of the other defendants. Point III deals with the adequacy of the relief decree by the District Court, including its upholding the legality of clearance.

These three points presented by Loew's, *as appellee*, will be followed immediately by Loew's position *as appellant* on Appeal No. 80. On Loew's appeal it will present six points which, with the assignments of errors to be urged, are:

IV. The District Court erred in finding and concluding that Loew's and the other defendants combined and conspired to restrain trade in distribution and exhibition of motion pictures (Assignments Nos. 3-13, 15-18, 20-24, 32 and 36-39; R. 3728-33, 3735-6).

V. The District Court erred in imposing a prohibition upon Loew's expanding its theatre holdings (Assignments Nos. 30, 31 and 33; R. 3735).

VI. The District Court erred in enjoining Loew's from owning any beneficial interest in a theatre with an independent (Assignments Nos. 25-29; R. 3733-4).

VII. The District Court erred in decreeing that whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof (Assignment No. 19; R. 3732).

VIII. The District Court erred in enjoining Loew's from agreeing with a licensee that the latter should charge a specified minimum admission price during the

exhibition of the feature licensed (Assignments Nos. 1 2 and 14; R. 2728, 2731).

IX. The District Court erred in failing to conclude that it had power to continue the arbitration system created by the consent decree and to provide for the arbitration of disputes between exhibitors and defendants arising under the present judgment (Assignments Nos. 34 and 35; R. 3736).

Note: The foregoing twenty-three pages of Loew's brief together with its appellant's points numbers IV-IX, were served on Government's counsel on January 16, 1948. On that occasion, Government's counsel in turn served a draft of its appellant's brief upon counsel for Loew's. We thus learned for the first time that the Government had abandoned and is not arguing the "third" of its "four main questions" just referred to; to wit, the claim that

> "the court erred as a matter of law in concluding that any of the defendants may make a valid clearance agreement for the purpose of protecting any exhibitor from competition."

As proof of the Government's abandonment of this "main" question we respectfully refer the Court to the Government's Specification of Errors to be Urged (brief, p. 46) which omits its assignment's numbers 4, 14 and 15 (R. 3721-2) directed to legality of clearance.

In view of the Government's abandonment of this point, Loew's, contrary to our previous statement at pages 22-23, will not present argument sustaining the District Court's holding that clearance is legal *per se*.

ARGUMENT AS APPELLEE ON APPEAL NO. 79

Point I.

THE DISTRICT COURT DID NOT ERR IN REFUSING TO CONCLUDE THAT LOEW'S INDIVIDUALLY OR COLLECTIVELY WITH THE OTHER PRODUCER-EXHIBITORS HAD A MONOPOLY OF EXHIBITION OR DISTRIBUTION OF MOTION PICTURES.

Introduction

In the District Court, in asking for a nationwide decree of divorcement against five of the principal companies in an industry (each concededly autonomous as to stock ownership, directors and officers[1]), the Government proceeded upon the theory that these five companies could be treated collectively and their separate theatre holdings aggregated so as to establish a nationwide monopoly of the exhibition business. Indeed, proof was not offered to establish illegal monopoly in any particular locality or localities.[2]

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[1]R. 215-216.

[2]The District Court held (R. 3554, 3556):

> "If in certain localities there is ownership by a single defendant of all the first-run theatres, *there is no sufficient proof* that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of competitors, their lack of financial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from 'inherent vice' on the part of these defendants.
>
> * * * * *
>
> *There is no evidence* that in a city such as Cincinnati, in which a major defendant owns all of the first-run theatres, other exhibitors, affiliated or unaffiliated, have been

Notwithstanding their endeavor in the District Court to establish a *collective* monopoly, Government's counsel frankly conceded that the following facts had been established:

> "1. Individually considered, each distributor defendant directly controls *only a fraction* of the entire domestic distribution business.
>
> 2. Individually considered, each producer-exhibitor directly controls *only a fraction* of the entire domestic exhibition business and the local theatre situations in which their individual control is 100% are few in number when compared to the total domestic theatre market."[1]
>
> (Government's brief in the District Court, p. 2)

In view of these facts, for the Government to have proven a collective monopoly, an obvious *sine qua non* was to establish that these concededly autonomous companies could be treated *collectively* and their separate theatre holdings *aggregated* to establish a *national monopoly*.

But the District Court properly held that "The five major defendants *cannot be treated collectively* so as to establish claims of general monopolization in exhibition," and that "there is no substantial proof that any of the corporate defendants *was organized* or *has been maintained* for the purpose of achieving a *national monopoly*, as was the case in *Standard Oil Co.* v. *United States*, 221 U. S. 1;

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prevented from also owning theatres for exhibition on first-run and there consequently is no monopoly in the legal sense, see *United States* v. *Pullman Company*, 64 F. Supp. 108, 112, and no reason for directing a divestiture."

[1] *So far as Loew's is concerned*, in no place *where it operates does it operate all the first-run theatres* (Appendices II and III).

United States v. *American Tobacco Co.*, 221 U. S. 106, and *United States* v. *Aluminum Co. of America*, 148 F. (2d) 416 (C. C. A. 2)." (Opinion, R. 3553)

In view of the foregoing and in view of the Court's further conclusion that the illegalities which it found were in trade practices and not in who owned the theatres concerned (Find. 154; R. 3690), it properly declined the divorcement sought by Government's counsel (Opinion, R. 3559).

In their present brief before this Court, Government's counsel have pursued a subtle but even more fallacious approach.

Once again, from the outset the Government's brief abounds with statistics of the *combined* theatre holdings and *combined* revenues of the five separate companies, without the establishment of the preliminary right to treat these separate companies collectively. And at page 11 of their brief Government's counsel state that they "challenge the court's failure to conclude that the defendants, both individually and *collectively, had monopolized* important segments of the motion picture industry."

But here, however, the similarity to the Government's District Court approach ceases.

While the Government at various places prior to the "ARGUMENT" in its brief mentions its disagreement with the failure of the lower court to find a *collective* monopoly, in its "ARGUMENT" it completely abandons this theory. No longer do Government counsel argue for the existence of *collective* monopoly. Instead, they now bottom their entire case for monopoly on a theory that each of the five separate producer-exhibitor companies, individually con-

sidered, is in and of itself a monopoly requiring dissolution to meet the requirements of the Sherman Act.[1]

As a consequence, the collective statistics, having no other purpose than such opprobrious effect as they may create, are neither validly sustained in the evidence nor relevant to the question at issue.

As proof of this complete change in theory by the Government, we point to the *only* headnote and the *only* argument in the Government's brief on the subject of monopoly warranting divestiture. The headnote reads as follows (Government's brief p. 90):

> "A. EACH INTEGRATED VERTICAL COMBINATION BETWEEN A MAJOR DEFENDANT'S PRODUCING AND DISTRIBUTING BUSINESS AND ITS AFFILIATED THEATRES CONSTITUTES A RESTRAINT AND A MONOPOLIZATION OF AN APPRECIABLE SEGMENT OF TRADE WHICH CAN BE REMEDIED ONLY BY DIVORCEMENT."

It would appear that this switching of horses in midstream by the Government from a theory of "collective monopoly" by five separate companies to one of "individual monopolization" by each of them has been inspired by a last-minute, but erroneous reliance upon *United States* v. *Yellow Cab Co.*, 332 U. S. 218, which was decided by this Court *after* the decision of the instant case by the lower court.

This is further demonstrated by the fact that two of the other three cases primarily relied upon by the Govern-

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[1] In the District Court the Government did make the argument that "each of the producer-exhibitor defendants is a combination which violates the Sherman Act *per se*." However, the entire basis of that argument was one of inter-defendant licensing and not that each integrated unit by its relations *intra se* was violating the act. Indeed, Government's counsel took the opposite position at R. 1945.

ment in support of this new theory, *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255, now cited or quoted from at pp. 50, 92, 93, 95, 105 and 106 of the Government's brief and *U. S.* v. *Swift & Co.*, 286 U. S. 106, now cited or quoted from at pp. 51, 109, 111, 114 and 133 of the Government's brief, *were not even referred to or cited in the brief of the Government before the District Court.*

Particularly in view of this new approach, which the Government has taken in this Court, against the defendants, *qua individuals*, the defendant Loew's is entitled to be dealt with *on its own individual record* and not that of other defendants before this Court.

The Government cannot establish a monopoly against the defendant Loew's for four reasons:

A. Loew's, *individually*, has no monopoly of theatre holdings or of first-run exhibition, either locally or nationally.

B. Loew's, *individually*, has no monopoly of distribution.

C. Neither the *Yellow Cab, Lehigh, Reading, Swift* nor any other case, supports the Government's theory that Loew's integrated business as a producer, distributor and exhibitor constitutes restraint and monopolization.

D. Loew's cannot be treated *collectively*, with Fox, Paramount, RKO and Warner to establish a monopoly of exhibition or distribution.

A. Loew's, *Individually*, Has No Monopoly of Exhibition, Nationally or Locally.

(1) Loew's has no monopoly in terms of theatre holdings.

The District Court made the following finding (R. 3684):

> "119. The present theatre holdings of the five defendant-exhibitors Paramount, Loew's, Fox, RKO and Warner, aggregate little more than one-sixth of all the theatres in the United States, and by such theatre holdings alone the defendants do not and cannot collectively or *individually*, have a monopoly of exhibition."

The Government takes issue with this finding by its Assignment of Error No. 20, reading as follows (R. 3723):

> "20. The Court erred in concluding that the defendants' theatre holdings are not large enough to permit them, *individually* or collectively, to have a monopoly of exhibition."

Loew's Exhibit L-2 establishes that on January 1, 1945, there were 18,076 motion picture theatres *in operation* in the United States. The lower court so found (Find. No. 145, R. 3688). Of this number, Loew's was operating 131 at the time of the hearings, which is 7/1,000 of the total theatres operating in the country (Exh. L-12; *cf.* Find. No. 118; R. 3684; Appendix to Government Brief in this Court, p. 255).

The location of *every* Loew-operated theatre throughout the country, city by city, as well as the total theatres

operating in those cities, are set forth in the table which follows:

City	Total Operating Theatres[1]	Number of Loew's Operated Theatres[2]
Akron, Ohio	34	1
Atlanta, Ga.	42	1
Baltimore, Md.	108	3
Boston, Mass.	34[3]	2
Bridgeport, Conn.	22	4
Canton, Ohio	10	1
Cleveland, Ohio	108	3
Columbus, Ohio	51	2
Dayton, Ohio	27	1
Evansville, Ind.	13	2
Harrisburg, Pa.	14	1
Hartford, Conn.	17	2
Houston, Tex.	47	1
Indianapolis, Ind.	56	1
Jersey City, N. J.	17	2
Kansas City, Mo.	52	1
Louisville, Ky.	36	1
Memphis, Tenn.	35	2
Meriden, Conn.	3	2
Nashville, Tenn.	20	1

[1]Source: Film Daily Year Book, (1945) pp. 826-932, except as to Baltimore, Md., Kansas City, Mo., New York, N. Y., New Orleans, La., Pittsburgh, Pa., St. Louis, Mo., and Washington, D. C., which are from Exhibit L-2.

[2]Source: Appendices II and III of this Brief, Exhibit L-2, Appendix to Government Brief in this Court, p. 255.

[3]Does not include metropolitan area, such as Brookline, Cambridge, etc.

City	Total Operating Theatres	Number of Loew's Operated Theatres
Newark, N. J.	41	1
New Haven, Conn.	23	3
New Orleans, La.	61	1
New York, N. Y. (Metropolitan area)	658	69
Norfolk, Va.	29	1
Norwich, Conn.	3	1
Pittsburgh, Pa.	82	1
Providence, R. I.	17	1
Reading, Pa.	10	1
Richmond, Va.	21	1
Rochester, N. Y.	32	1
St. Louis, Mo.	95	2
Springfield, Mass.	14	1
Syracuse, N. Y.	26	2
Toledo, Ohio	32	2
Washington, D. C.	64	3
Waterbury, Conn.	11	2
Wilmington, Del.	13	1
Worcester, Mass.	11	2
Yonkers, N. Y.	9	1
TOTAL ALL CITIES WHERE LOEW'S OPERATES	1,998	131 (6.6%)[1]

[1]This does not include 11 theatres operated by Buffalo Theatres Inc. (10 in Buffalo and 1 in Niagara Falls), for which Loew's did the buying and booking of films. We do not regard these theatres as actual Loew-operated theatres, but, to avoid controversy, on all revenue and product charts introduced in evidence by Loew's these theatres were included. In addition, in considering Loew's first-run situations across the country, again to avoid controversy, we have included the cities of Buffalo, New York, and Niagara Falls, New York, which are not included in the foregoing list for the reason stated. This brings the total cities to 42 as contrasted to the 40 listed here.

Summary by States

State	Total All Theatres Operating In State[1]	Number of Loew's-Operated Theatres[2]
Connecticut	196	14
Delaware	35	1
Georgia	358	1
Indiana	441	3
Kentucky	279	1
Louisiana	347	1
Maryland	238	3
Massachusetts	387	5
Missouri	575	3
New Jersey	390	3
New York	1,279	73
Ohio	910	10
Pennsylvania	1,186	3
Rhode Island	62	1
Tennessee	295	3
Texas	1,218	1
Virginia	260	2
Washington, D. C.	64	3
TOTAL ALL STATES WHERE LOEW'S OPERATES	8,520	131 (1.5%)

The foregoing tables establish three facts of decisive significance with respect to Loew's theatre operations.

First, Loew's has no "closed town," i.e. in no city where Loew's operates does it operate all of the theatres in that city;

Second, in each state where it operates it operates an infinitesimal part of the total operated theatres in that state, and

[1]Source: Exhibit L-2.
[2]Source: Summary of preceding table.

Third, in each particular locality where Loew's operates, Loew's theatres are but a fraction of the total theatres operating there.

It is to be noted that of the total number of 69 theatres operated by Loew's in the New York metropolitan area (which represent but 1/10th of the total theatres operating there), two are first-run Broadway theatres, the Capitol and the Criterion facing the competition of eight independent first-run theatres—Radio City Music Hall, Astor, Rialto, Gotham, Republic, Victoria and Ambassador (Appendix II of this brief, p. xii).

Additional first-run competition in the Broadway area is provided by the Roxy, operated by Fox, the Paramount, operated by Paramount, the Hollywood and Strand by Warner, and the Palace by RKO (Appendix II of this brief, p. xii).

The remaining 67 of Loew's theatres in the metropolitan area of New York are operated on subsequent run. That each of them meets with the severest competition is illustrated not only by the maps of the five boroughs of New York (Exh. L-15), which show every Loew theatre closely surrounded by at least three or four other theatres, but by the other very substantial circuits operating on subsequent run in this area. Those circuits, as set forth in Exhibit L-15a, are:

Circuit	Number of Theatres Within Five Boroughs of Greater New York	Number of Theatres Outside the Five Boroughs of Greater New York	Total Number of Theatres
BRANDT	79	41	120
RANDFORCE	44	None	44
SKOURAS	27	36	63
R. K. O.	34	21	55
ISLAND	28	24	52
INTERBORO	29	7	36
CENTURY	21	15	36
TOTALS	262	144	406

That Loew's has not indicated even a tendency to monopolize exhibition *in terms of theatre holdings*, is conclusively demonstrated by the very limited increase in the number of its theatres over the past 13 years.

From January 1, 1932 to the date when these hearings commenced in 1945, the total theatres operated by Loew's increased by only 9, from 122 to 131. During the same period, the total theatres operating in the United States expanded by 5,471, from 12,605 to 18,076.

This, we submit, establishes beyond question that Loew's has not used its theatres (nor, indeed, its position as a producer and distributor of films) to expand its theatre position to the exclusion of other operators. Loew's Exhibit L-12 sets forth in graphic form the increase in total theatres in operation in the United States for the period from 1932 to 1945 and the increase in the total theatres operated by Loew's during the same period. The respective figures are set forth below:

Jan. 1	Total Theatres	Loew's Theatres
		131*
1945	18,076	132
1944	17,919	133
1943	17,728	131
1942	17,919	126
1941	17,541	127
1940	17,003	126
1939	15,701	126
1938	16,251	126
1937	16,055	123
1936	14,161	124
1935	13,386	126
1932	12,605	122
Gross Increase	5,471	9

*Oct. 1, 1945.

On such a record, we submit, it borders on the absurd to assert that Loew's *individually*, has monopolized, or has power to monopolize either national or local exhibition.

(2) Loew's has no "first-run" monopoly in any city where it operates.

The Government's Assignment of Error No. 2 reads as follows (R. 3721):

> "2. The Court erred in concluding that the major defendants had not actually achieved a monopoly in exhibition, either singly or collectively."

In the court below the Government based its claim that the defendants, "singly", have achieved a monopoly of exhibition on the ground that each of them enjoys a monopoly of first-run exhibition in the larger cities across the country where they respectively operate theatres. The plaintiff's contention so far as Loew's is concerned, is conclusively rebutted by the record.

The District Court found (R. 3689):

> "149. Loew's operates first-run theatres in 36 of the 92 cities in the United States with more than 100,000 population; in every one of these 36 cities, there are other 'first-run' theatres exhibiting the features of one or more of the other defendant distributors; in 21 of these 36, one or more of the other first-run theatres are operated by independents."

The District Court, therefore, affirmatively found that in *not one of these cities of over 100,000 population where Loew's operates does it have a monopoly of first-run exhibition.* On the contrary, in every one of them there are other competing first-run theatres and in the great majority

of them (21) one or more of these first-run houses are independents.

As a basis for this Finding No. 149, defendant Loew's tendered evidence as to the detailed conditions in each of the 36 cities of over 100,000 population where it operates first-run theatres. This information has been summarized with respect to each of the cities and is included in Appendix II to this brief. The cities are listed in alphabetic order but to make clear the significant facts with regard to each of these local situations, we include as illustrative the first in the alphabet, which is Akron Ohio. Appendix II discloses the following with respect to this city:

AKRON, OHIO

Theatre1	Capacity1	Operator1	Affiliation2	Product3
Colonial	1750	Fiber & Shea	Independent	(Fox (RKO ½
Strand	1160	Warner Bros.	War	War
Palace	2083	Katz & Chatkin	Independent	(Uni (Par ½ (RKO ½ (Col
Loew's	*2986*			*Loew's 29* *UA 19* *Par 16*

Abbreviations

Loew's Metro-Goldwyn-Mayer...Loew's
20th Cent. Fox .....Fox
Paramount .....Par
RKO .....RKO
Warner Bros .....War
Columbia .....Col
Universal .....Uni
United Artists .....UA

Sources

1—Exh. L-13, L-17, 48
2—Exh. 156-163, 359-360
3—Exh. L-17, 44, 58, 84, 95, 129, 145, 147, 349 (Products listed are limited to those of 8 defendants)

In connection with Akron, Ohio, we call particular attention to two facts: *First*, Loew's clearly has no monopoly of first-run exhibition. There are two *independent first-run* theatres and another smaller theatre operated by Warner, not to mention 29 additional theatres operating on subsequent run (p. 31 of this brief). *Second*, although Loew's has outstandingly the largest theatre, it certainly has no monopoly of the exhibition of the features distributed by the other seven defendants. In the 1943-44 season, the Loew's theatre exhibited 29 of its own pictures and 19 of United Artists' (a distributor which owns no theatres) and 16 pictures of Paramount. *The Palace*, one of the independent theatres, had all of the product of Universal, all of Columbia, one-half of RKO and one-half of Paramount. The other independent theatre, *The Colonial*, had all the product of Fox, and one-half of RKO.

How unjust and unwarranted it would be to prohibit the producer Loew's and the producer Warner from exhibiting in Akron, Ohio, on any theory that they have a monopoly of first-run exhibition in this local situation. We point this out simply to demonstrate that the Government's technique of lumping nation-wide statistics as to first-run exhibition and demanding thereupon a segregation of production and exhibition is wholly unwarranted when examined in the light of local situations and specific defendants.

An examination of the balance of the 36 cities where Loew's operates first-run theatres, all set forth in Appendix II, will disclose that *Loew's has no first-run monopoly in any city where it operates.* Indeed, in virtually every one of these 36 cities, Loew's first-run theatres represent but a fraction of the first-run theatres competing in those cities.

In addition to the 36 cities with over 100,000 population, Loew's operates first-run theatres in 6 cities of less than 100,000 population bringing the total to 42. These cities of

less than 100,000 are Evansville, Ind., Harrisburg, Pa., Meriden, Conn., Niagara Falls, N. Y., Norwich, Conn., and Waterbury, Conn. In every one of the 6 cities with less than 100,000 population, Loew's has competition on first-run, similar to that in the 36 just described (see Appendix III to this brief).

On pages 21 and 55 of its brief, the Government argues that in the cities of between 25,000 and 100,000 population, the producer-exhibitor defendants own interests in 577 of a total of 978 first-run theatres; in addition, that in 135 such cities, the affiliated first-run theatres played all of the product of the eight defendants. Loew's operates in only six cities of less than 100,000 population (Appendix III to this brief). Each such city is in the category of between 25,000 and 100,000 population. The theatres operated by Loew's in these six cities are a total of 9 (Appendix III of this brief). Thus, Loew's operates only 9 theatres of the 577. In not one of these six cities does Loew's have the product of all eight distributor defendants. (Appendix III of this brief). Thus the Government's charge as to these 135 cities is in no way applicable to Loew's.

The Government also asserts at page 21 of its brief:

> "And in at least 300 additional towns, most of them with populations under 25,000, an operator affiliated with one of the major defendants has all of the theatres in the town (Exs. 371, 397; R. 359-370, 2166)."

Loew's does not operate a single theatre in any such town.

(3) Loew's first-run theatres do not monopolize the available film supply.

We have shown that in the case of Akron, Ohio, Loew's had in addition to its own, the product of United Artists and one-half the season's product of Paramount and

that the two *independent* first-run theatres, *The Palace* and *The Colonial* had between them *all of the product of Fox, all of RKO, all of Columbia, all of Universal* and *one-half of Paramount*. Loew's was certainly not monopolizing available film supply. The fact is, that Loew's first-run theatres across the country use a relatively small portion of the other four producer-exhibitors' product. In this regard the District Court found (R. 3686):

> "131. In 21 of the 36 out of the 92 cities where Loew's operates theatres *none of the other four producer-exhibitors* licensed its features in the 1943-44 season for first-run exhibition in a Loew's theatre, to the extent of more than three features, the Loew's theatres' first-run exhibition being otherwise limited to its own features and those of non theatre-owning producers."

In the remaining 15 of the 92 cities where Loew's operates theatres, there are 5 in which Loew's used the product of only one other producer-exhibitor, 7 where it used the product of two, and only 3 where it used the product of three other producer-exhibitors. In no place does Loew's have the product of all four other producer-exhibitors (Appendix II to this brief).

The fact that Loew's did not exclude independent first-run theatre operators from the use of the majors' product is conclusively demonstrated by the situation in Indianapolis, Louisville, St. Louis and Harrisburg. In those cities Loew's operates the only affiliated first-run theatres in the city, all competing first-run theatres being independent. In not one of these cities did Loew's have the product of any one of the other four producer-exhibitors. *Instead, in each place all four, Fox, Paramount, RKO and Warner, licensed the independent first-run theatres to the exclusion of Loew's* (Appendices II and III of this brief).

B. Loew's, *Individually*, Has No Monopoly of Distribution.

The District Court made the following finding with respect to distribution (R. 3677):

> "99. During the 1943-44 season, the number of features distributed by eight distributor-defendants and the three other national distributors were as follows:

Distributor-defendants	No. of Films	Percentage of Total: With Westerns Included	Percentage of Total: With Westerns Excluded
Fox	33	8.31%	9.85%
Loew's	33	8.31%	9.85%
Paramount	31	7.81%	9.25%
RKO	38	9.57%	11.34%
Warner	19	4.79%	5.67%
Columbia	41	10.32%	12.24%
United Artists	16	4.04%	4.78%
Universal	49	12.34%	14.63%
Sub-total	260		
Other National Distributors			
Republic (29 features, 30 Westerns)		14.86%	8.66%
Monogram (26 features, 16 Westerns)		10.58%	7.76%
PRC (20 features, 16 Westerns)		9.07%	5.97%
		100%	100%
Sub-Total.. 137	397		
Total without Westerns...	335"		

It is clear from the foregoing that at the maximum Loew's distributes but 9.85% of the total pictures distributed in the United States. The record not only negatives monopolization of distribution in terms of number of features distributed, but it is also wholly void of any indication that any of the distributors, including Loew's, has used its power either as a producer, as a distributor, or as an exhibitor, to exclude others from the distribution field.

Government's counsel conceded (R. 387):

> "But I would concede that the evidence you have before you does not show that any particular independent producer who wanted to make a picture could not get it released by one of these distributors."

We respectfully submit that it is idle to talk about exclusion in the distribution field, where just as in the production field, there is absolutely no evidence that anyone who wishes to spend the money on distribution facilities, cannot enter upon the business of "selling" motion pictures to the 18,076 theatres operating in the United States today (Ex. L-2). In view of this lack of proof, the lower court was altogether warranted in holding (Opinion, R. 3554):

> "Outside the limits of the trade practices and agreements which we have found to violate the anti-trust laws and which will under the final decree be abolished, there is general competition among all the defendants as well as between them and independent distributors for the exhibition of their various pictures."

C. Neither the *Lehigh, Reading, Yellow Cab, Swift* nor any Other Case Supports the Government's Theory that Loew's Individual Business as Producer, Distributor and Exhibitor Constitutes a Restraint and Monopolization.

(1) These authorities do not support the Government's legal theory.

The District Court found "active competition" in the production of motion pictures.[1]

We have demonstrated that the District Court's findings as to the competitive character of Loew's participation in both national and local exhibition are amply supported by the proof.

In distribution Loew's participates to the extent of distributing less than 1/10 of the pictures distributed in the United States in competition with all other distributors in the industry and the Court so held.[2]

Notwithstanding the competition with which Loew's is faced in each phase of its business, Government's counsel advance the theory that, individually considered, Loew's integrated business as producer-distributor-exhibitor constitutes a restraint and monopolization requiring divorcement.

Thus at pages 90-91, the Government's brief argues:

> "We contend that each vertical affiliation between a major distributor and its theatres necessarily results in a continuing restraint and monopolization with respect to that important segment of trade rep-

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[1]Finding No. 59; R. 3670. While the Government assigned error to this finding (No. 12; R. 3722) it has abandoned and is not urging this error in argument (Gov't Brief, pp. 46-53).

[2]Opinion, R. 3554.

resented by the pictures it distributes to its own theatres.

* * * * * *

"It is clear, * * *, that such integrations were in no sense an effort to meet an expanding business demand resulting from superior skill in film production or distribution. They were in each case a deliberate creation of a market control which would assure them of retail outlets regardless of the merits of their product."

Further explaining their theory in this regard, Government's counsel argue, pp. 91-92:

"Each vertical relationship thus has two serious trade-restraining consequences. First, to the extent that the motion picture requirements of each group of affiliated theatres are satisfied by the pictures of its distributor all other distributors are excluded from that important segment of the market. Second, wherever a distributor has theatres, the other exhibitors are excluded from the opportunity of licensing the exclusive runs reserved for the distributor's own theatres."

In furtherance of its contention the Government's brief (p. 96) points out that during the 1943-'44 season Loew's distributed 33 out of a total of 260 pictures distributed by the defendants, and a total of 335 distributed by all national distributors, and in addition that Loew's had theatre interests in "135" theatres, citing Findings 99 and 118 (R. 3677, 3684). From these facts the Government concludes that "each vertical relationship results in a restraint and a monopolization of an 'appreciable segment' of the market" (Gov't brief, p. 96).

We do not question that Loew's participation in distribution and exhibition represents "an appreciable segment of the market." However, we do challenge the Government's theory that possession of such an appreciable segment by an integrated business *per se* establishes restraint and monopolization. Market *control*—not merely possession of an appreciable segment of the market—is the key to illegality. And market control can be considered only in relation to a particular market, or of course the national market. An integrated enterprise which acquires market control with a deliberate, calculated scheme to crush competition undoubtedly constitutes illegal monopolization. But no such case exists as to Loew's.

In support of its theory the Government relies primarily upon four cases: *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255, *United States* v. *Reading Co.*, 253 U. S. 26, *United States* v. *Yellow Cab Co.*, 332 U. S. 218, and *United States* v. *Swift & Co.*, 286 U. S. 106.

None of these cases support counsel's theory.

The *Lehigh, Reading* and *Yellow Cab* cases stand for or recognize the proposition that vertical integration *intentionally created to obtain market control* constitutes an illegal restraint and, where market control is obtained, monopolization.

The basic fallacy in the Government's application of this proposition to the case at bar is in the meaning which its counsel assign to "market control".

Obviously, if a manufacturer of shoes acquires one of five retail shoe stores in a community, that manufacturer is not thereby acquiring market control, notwithstanding that all other manufacturers are precluded from selling its shoes to that store, notwithstanding that the manufacturer thus acquires a retail outlet regardless of the merit of its

product, and notwithstanding that other shoe stores in the community are excluded from handling the manufacturer's product. Nor would market control result if this shoe manufacturer acquired in the course of normal expansion one shoe store in every one of a hundred similar communities where there were competing shoe stores. This is so, even though an *appreciable segment* of the shoe market is involved in the business of a hundred shoe stores.

On the other hand, if the same manufacturer bought up all or practically all of the retail outlets in the single community first mentioned, with the deliberate calculated purpose of eliminating its competition in that community, there would be the type of market control contemplated in the authorities erroneously relied upon by the Government.

In other words, when these authorities use the term "market control", they always have in mind a local market in which the defendant is operating, or of course a national market, and not that market represented by the defendant's own business. Were this not so, any integrated enterprise would be condemned, for to the extent of its own retail business, an integrated enterprise excludes other producers from utilizing that retail outlet, and by the same token excludes other competing outlets from purchasing the goods of that integrated producer.

The *crux* of the question must always be whether the integrated enterprise, through a deliberate, calculated course of conduct has acquired *control* of a *particular* market in which it is operating.

The basic fallacy in the Government's theory is well illustrated by the *Lehigh* case itself (254 U. S. 255). The market of the defendant, Lehigh Valley Railroad Company, was in the coal fields adjacent to its tracks and among the coal operators seeking carriage of their commodity to

distant cities. The particular area, the Wyoming Field in Pennsylvania was also served by a connection with The Reading Railroad, The Pennsylvania Railroad and The Jersey Central Railroad. The Lehigh commenced a systematic buying up of the coal fields adjacent to its road and in 1905 purchased the coal operating company which owned the connection with the competing railroad lines. Finally in 1908 the Interstate Commerce Commission found that the Lehigh

> "controlled 95% of the tonnage moving over its line to tide water" (254 U. S. 263).

In other words, the Lehigh went into its market and acquired virtually complete control thereof. As this Court put it at 254 U. S. 269:

> "Without further comment, this discussion of the record requires us to conclude that it is clearly established that prior to the enactment of the Anti-Trust Act, the Railroad Company, in combination with its coal company subsidiary, *deliberately* entered upon a policy of making extensive purchases of *anthracite land tributary to the Railroad Company's lines*, for the purpose of controlling the mining, transportation and sale of coal *to be obtained therefrom* and of preventing and suppressing competition, especially in the transportation and sale of such coal in interstate commerce, and that this policy was continued after the passage of the Anti-Trust Act with increasing energy and tenacity of purpose, with the result that a *practical monopoly was attained of the transportation and sale of anthracite coal derived from such lands.*"

The fact that the Lehigh Valley Railroad Company controlled 20% of the total national anthracite market was

of no significance in the decision of that case. In other words, the fact that 20% of the national market represented an appreciable segment of commerce, was in no way determinative of the legality or illegality of the integration. The decisive point was that the Lehigh Railroad Company intentionally acquired dominant control, to wit, 95%, of the market there involved.

The *Reading* case is in the same category (253 U. S. 26). There, the Schuylkill coal area of Pennsylvania was involved. The tracks of the Reading Railroad, the Pennsylvania Railroad and the Lehigh Valley Railroad companies each entered the Schuylkill region. Once again, it was a case of the defendant by a deliberate, calculated plan acquiring control of a particular market in which it was involved. Indeed, the Government's brief in the *Reading* case pointed out (p. 34):

> "* * * Reading Holding Company controls, as before stated, more than two-thirds of all the coal-bearing lands in the entire Schuylkill region."

In addition to the *vertical* integration whereby control of the Schuylkill anthracite field was obtained, the Reading Holding Company acquired the stock of a competing road, which served an adjacent coal field, and likewise there owned a large coal operating company. There was thus also effected a horizontal integration, or "complete dominion over two great competing interstate carriers and over two great competing coal companies" (253 U. S. 59).

In consequence, it is little wonder that in the *Reading* case this Court held:

> "* * * this dominating power was not obtained by normal expansion to meet the demands of a busi-

ness growing as a result of superior and enterprising management but by deliberate, calculated purchase for control" (253 U. S. at 57).

The *Yellow Cab* case (332 U. S. 218) does not change the principles enunciated by this Court in the *Reading* and *Lehigh* cases. Since the case came to this Court on appeal from a judgment dismissing the Government's complaint on motion there was in fact no holding of monopolization of any kind. So far as relevant here, the case stands only for the proposition that the amount of commerce there involved was a sufficient segment of commerce to be the subject of a Sherman Act violation and that the complaint was not insufficient for failure to allege a monopoly of the total number of taxicabs in the country. The case also held that the defendants could not claim exemption from the anti-trust laws simply because they were affiliated by common stock ownership. There is nothing whatever in the *Yellow Cab* case which changes the cardinal rule that a monopolization can occur only with respect to the acquisition of control of a particular market pursuant to a deliberate, calculated scheme to obtain such control.

The *Swift* case (286 U. S. 106) is definitely not a precedent to be applied to the case at bar. In that case the defendants voluntarily consented to the entry of a decree under which they agreed to refrain from engaging in certain businesses, including the wholesale grocery business. Ten years later, upon application of some of the defendants, the District Court removed the prohibition in the consent decree against the defendants' participation in the wholesale grocery business. This Court in reviewing the propriety of the lower court's action plainly indicated that the only question involved was whether there was a sufficient change

in conditions as to warrant the removal of the ban to which the defendants had consented. This Court stated at 286 U. S. 119:

> "Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.
>
> * * * * *
>
> They chose to renounce what they might otherwise have claimed, and the decree of a court confirmed the renunciation and placed it beyond recall. What was then solemnly adjudged as a final composition of an historic litigation will not lightly be undone at the suit of the offenders, and the composition held for nothing."

In this case obviously no such question is presented.

The Government's reliance upon *Interstate Circuit* v. *United States*, 306 U. S. 208, to bolster its newly adopted theory of illegality of integration is also without merit. The Government argues at pages 98 *et seq.* of its brief that integration of production, distribution and exhibition, violates the Sherman Act because it sanctions a restraint of trade outlawed by the *Interstate* decision. Counsel point to the provision of the judgment in the case at bar, which permits a distributor to exhibit its pictures in any theatre in which it has an interest of 95% or more upon any terms satisfactory to it, (Section IV, R. 3700), and argue therefrom that if Paramount owned a 95% instead of a 50% interest in the Interstate Circuit, it could impose the unreasonable restraints against independents which were held illegal in the *Interstate* decision.

This argument is fallacious because the *Interstate* case was fundamentally one of horizontal conspiracy, i.e. a conspiracy on the part of Interstate Circuit with all of the distributors to restrain the competition of independents. Consequently, even the complete integration of Paramount and Interstate would not render innocent any such illegal conspiracy as that fostered by Interstate. In the case at bar, of course, any conspiracy among distributors found by the District Court has been wholly eliminated by its sweeping injunction against minimum admission prices, unreasonable clearances, etc., as well as the requirements of competitive bidding.

The *Interstate* case in no way detracts from the right of a copyright holder to exhibit its own picture and to prevent its exhibition by others. Indeed, even the Government concedes "that under the Copyright Act, the copyright owner has the right to exhibit its own pictures and to prevent their exhibition by others * * *" (Government's brief, p. 97).

This being so, the provision of the District Court's judgment in the present case which permits a distributor to exhibit its own pictures in its own theatres, upon such terms and subject to such conditions as may be satisfactory to it in no way runs counter to the holding of the Court in the *Interstate* case.

We do not contend, however, that this copyright privilege becomes a shield for illegal restraints or monopolization. Accordingly, if a producer-exhibitor in exhibiting its pictures in a particular locality adopts a course of action with a deliberate calculated scheme to crush competition and acquires market control, there would result an illegal restraint and monopolization, notwithstanding the legality imparted by the Copyright Act to the integrated business of production and exhibition of motion pictures.

We submit, therefore, that the judgment of the District Court, in sustaining the ownership of theatres by producer-exhibitors does not sanction a "continued restraint of trade implicit in such ownership", as the Government contends (brief, p. 103), for whatever illegalities may occur, do not arise from the integration *per se*.

(2) Loew's integrated business does not come within the condemnation of the *Lehigh*, *Reading*, *Yellow Cab*, *Swift* or any other case.

So far as Loew's is concerned, there is absolutely no *factual* basis for bringing it within the condemnation of any of these decisions.

We have shown that Loew's has not monopolized theatre holdings, either on a local or a national basis and that it has not monopolized first-run exhibition in any locality where it operates. Thus, even though its business represents an appreciable segment of the motion picture industry, it has *no market control* in any place where it operates.

Although we need go no further to establish that Loew's factually does not come within these cases, there is an additional ground of distinction on the facts so far as Loew's is concerned. An essential requisite in all of those cases, and even in the Government's theory itself, is proof that the integration was brought about for the *deliberate, calculated purpose* of obtaining market control.

In two instances in the Government's brief counsel attempt to bring Loew's within this condemnation. Thus at page 54 the assertion is made:

> "Five of these defendants have entered the exhibition field on a large scale, primarily by purchasing theatre circuits from former independent operators

(Fdgs. 8, 18, 19, 21, 27-29, 30, 42, R. 3662, 3664-3665, 3667)."

Again at page 91 it is alleged:

> "Most of the major defendants' vast theatre holdings were acquired through purchase of assets or stock in, or merger with, independent theatre enterprises (Fdgs. 8, 21, 28-30, 42; R. 3662, 3664, 3665, 3667)."

None of the findings relied upon in either of these general statements makes any reference to Loew's whatsoever.

The Government's brief goes further. It argues on pages 47 and 91:

> "These vertical combinations were formed in order to acquire an assured outlet for films.
>
> * * * * *
>
> It is undisputed in the record that the other four major defendants [Loew's, Fox, RKO and Warner] also integrated theatre operations with film distribution in order to have non-competitive market outlets for their films."

Neither the general statements, charging the "five" defendants with *entering* the exhibition field by purchasing theatre circuits, nor the specific statement at pages 47 and 91 of the Government brief that these combinations were formed in order to acquire an assured outlet for films can in any way apply to Loew's. Indeed, the Government's brief itself at page 14 concedes that Loew's integrated production, distribution and exhibition unit came into being, *not* by a distributor "purchasing theatre circuits *from former independent operators*", but by Loew's, *a theatre operator*, acquiring Metro Pictures Co., a producer and distributor. Says the Government brief (p. 14):

> "In 1920, Loew was a substantial theatre operator. At that time it acquired Metro Pictures Co., a producer and distributor. In 1924, Metro was merged with Goldwyn Pictures Co. and Mayer Pictures Co., both producers and distributors, to form Metro-Goldwyn-Mayer (Ex. 48, R. 181)."[1]

Moreover, the Government brief acknowledges the exceptional position as to Loew's, for at page 15 it states:

> "In 1929 and 1930, all of the major defendants *except Loew* acquired additional theatre circuits and emerged in 1930 in substantially their present form (Exs. 45, 85, 94, 116, R. 175, 197, 203, 209)."

Of course, we do not deny that the theatres operated by Loew's *have* increased over the years, but it has been *only a very gradual, normal growth.* The record affirmatively shows, without contradiction, that over the 13 years preceding the hearings in this case, the theatres which Loew's operated increased by only 9, bringing its total to only 131[2] (Exh. L-12). During this same span of time the total theatres operating in the United States increased by 5,471, an increase of 600 to 1 of Loew's (Exh. L-12; cf. Find. 145; R. 3688).

This conservative normal growth which has characterized Loew's theatre operations is in striking contrast to

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[1]"Mayer Pictures Co." was not a distributor, only a producer (Ex. 48, P. 181).

[2]These 131 theatres operated by Loew's are but a fraction of its co-defendants' interests in theatres, with the exception of RKO which operates 109 theatres (Find. 118; R. 3684) and are less than both the Griffith and Schine circuits, each of which has 147 theatres. (Film Daily Year Book [1947] pp. 1057, 1078; appellant's brief in *Schine Chain Theatres Inc.* v. *U. S.*, No. 10, October Term 1947 at p. 28.)

the rapid expansion attendant upon illegal operations as in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173. There, the District Court in discussing the expansion of the defendant Crescent Amusement Co., and its affiliates (none of which is in any way connected with any of the defendants in the case at bar) said (323 U. S. 181 [footnote]):

> "On August 11, 1934, the defendant exhibitors and their affiliates operated in *thirty-two* towns in Tennessee (excluding Nashville), Kentucky, and Alabama, in six of which they had competition. On August 11, 1939, the defendant exhibitors and their affiliates, with the exception of Strand, heretofore dismissed as a defendant, operated in *seventy-eight* towns in Tennessee (excluding Nashville), Kentucky, Alabama, and North Carolina * * *"

In view of the entirely legitimate growth of Loew's theatre operations, it is not surprising that Monograph No. 43, *The Motion Picture Industry—A Pattern of Control*, TNEC, which is relied upon and cited by the Government at page 16 of its brief, makes the following statement at page 15:

> "Loew's has *always* pursued a very conservative policy regarding theatre acquisitions."

On such a record as this there can be no support for the Government's contention, so far as Loew's is concerned, that the integration came about for the *deliberate, calculated purpose* of obtaining market control.

It follows, therefore, that there is no justification either in fact or in law for the Government's theory that Loew's integrated business of producing, distributing and exhibiting motion pictures constitutes monopolization and restraint.

D. Loew's Cannot be Treated Collectively With Fox, Paramount, RKO and Warner to Establish a Monopoly of Exhibition or Distribution.

The Government's brief in this Court does not present argument, as in the District Court, in support of a collective monopoly of exhibition and distribution on the part of the five major defendants. On the other hand, at page 11 of their brief in this Court Government's counsel point out that they "challenge the Court's failure to conclude that the defendants, both individually and *collectively, monopolize* important segments of the motion picture industry."

Because Government's counsel have noted this objection and because they constantly submit *collective* statistics throughout their brief and argue that the five defendants do not compete with each other, we are obliged to present argument that these five companies cannot be treated collectively to establish claims of monopolization and that they in fact all compete with each other.

Preliminarily, however, we shall show that the five companies even on an aggregate basis have no monopoly of exhibition.

(1) The five companies, even if aggregated, have no monopoly, either of theatre holdings or of the national exhibition business.

As we have previously shown the District Court found (R. 3684):

> "119. The present theatre holdings of the five defendant-exhibitors Paramount, Loew's, Fox, RKO and Warner, *aggregate* little more than one-sixth of all the theatres in the United States, and by such theatre holdings alone the defendants do

not and cannot *collectively* or individually, have a monopoly of exhibition."

To this finding, as we have also previously indicated, the Government assigns error, as follows (R. 3723):

> "20. The Court erred in concluding that the defendants' theatre holdings are not large enough to permit them, individually or *collectively*, to have a monopoly of exhibition."

In thus presenting the collective picture, i.e., the *aggregated* theatre holdings and the *aggregated* exhibition business of these five companies, we do so solely to demonstrate that even on that basis, monopoly of national exhibition is non-existent. We challenge counsel's right to *aggregate* the properties and business of these five separate companies and to deal with them as though they were *one* organization. There is no legal or factual justification for that technique of proving monopoly by what amounts to an assumption of its existence. However, for the purpose of the present sub-point we shall deal, *arguendo*, with the situation produced by *aggregation* as to theatre holdings and as to the business of exhibition.

The detailed facts as to the five companies' theatre holdings are set forth in the District Court's Finding of Fact No. 118, which reads in part as follows (R. 3684).

> "118. In the year 1945 there were about 18,076 motion pictures theatres in the United States, of which the five major defendants had interests in 3,137, or 17.35 percent [one-sixth] * * *"

Since the five producer-exhibitors collectively are interested in but 17.35%, or one-sixth of the total theatres presently operating in the United States, there should be

no question but that the District Court was correct in finding that the five major companies do not monopolize exhibition in terms of their *aggregate* theatre holdings.

Nor is the absence of collective monopoly confined to mere *numbers* of theatre holdings. It is non-existent even as to the portion of exhibition *business* carried on by these five companies.

It will be recalled that it is one of the major complaints of counsel for the Government that among them Fox, Loew's Paramount, RKO and Warner control the greater portion of the first-run theatres throughout the country and consequently develop the greatest box office receipts and pay the highest film rentals. Notwithstanding this fact, even when *all* theatres of the five companies exhibiting on *any* run *are aggregated,* they carry on collectively *less than half* of the exhibition business in the country. The Government states with apparent satisfaction at page 57 in its brief "While defendants' theatres comprise only a little over 17% of the total number of theatres in the United States, they have paid 45% of the total domestic film rental received by all eight distributor-defendants."

We submit that the fact that 17% of the theatres in the country produce 45% of the revenue does not alter the conclusion in any respect that 45% of the total revenue nowhere near approximates a monopoly of total exhibition. Whether the ability of 17% of the country's theatres to produce 45% of the revenue is based upon larger theatres, legally acquired, superior skill, enterprise and management or arises from conspiracies and illegal restraints, it is perfectly clear that the answer to that question does not change the fact that 45% (made up from five companies) is by no means the equivalent of a national monopoly.

(2) The Government's aggregation of first-run theatres and the film rentals which they pay, is without support in law or in fact.

(a) There is no legal precedent or justification for treating these five autonomous companies as a unit.

Apparently aware that Fox, Loew's, Paramount, RKO and Warner even collectively have nothing that approaches a nationwide monopoly of exhibition, the Government in the lower court restricted the scope of its claim of monopoly to but a part of exhibition, to wit, *first-run* exhibition in the larger cities of the country.[1] In so doing, of course, at least 17,500 of the 18,076 theatres[2] and well over half of the exhibition business in the country, are removed from the calculations.

While the Government in its present brief does not argue expressly for collective monopoly of first-run exhibition it states at pages 20 and 55: Fox, Loew's, Paramount, RKO and Warner, as exhibitors, have *in the aggregate* 70% of the first-run theatres in the 92 cities of the United

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[1]Government's Brief in the District Court, p. 1:

> "1. Fox, Loew, Paramount, RKO, and Warner, the producer-exhibit defendants, collectively receive as film distributors more than 70% of the total film rental derived from *first-run* theatres in the United States.
>
> 2. They collectively own, through direct or indirect stock ownership and operating agreements, a financial interest in the operation of more than 70% of the 'key city' *first-run* theatres in the United States."

[2]Exhibit L-13, set forth at pp. 327-338 of the Appendix to the Government brief in this Court, shows that there are only 512 *first-run* theatres in the 92 cities of over 100,000 population in the United States. These 512 theatres, of course, include both independent and affiliated theatres.

States with over 100,000 population. By reason of having this 70% of the first-run theatres, these five companies, as distributors, obtain *in the aggregate* at least 71% of the total film rental paid by the first-run theatres of each of them.

The purport of this presentation is plain: by *aggregating* the first-run theatres of the five producer-exhibitors, and treating them as though they were parts of *one* organization the Government sees a monopoly of first-run exhibition. Then, proceeding on this premise (which we say is false) the deduction is that since these five companies have a monopoly of first-run exhibition, the film rentals paid by the theatres of each of them to the five companies, as distributors, are to be *aggregated,* and that if this is done, it demonstrates that the five have a monopoly of distribution.

But take away this *aggregating* of the five companies' first-run theatres—consider these five autonomous companies separately, and the theory for *collective* monopoly collapses. First, goes the monopoly of exhibition and then falls the monopoly of distribution built thereon.

We respectfully ask what precedent is there for treating five wholly autonomous companies as a single unit?

We refer to them as "autonomous" with due regard for the meaning of the word. They are wholly independent, as Government's counsel conceded when he stated (R. 215), "* * * as between the eight groups of defendants, I think it is quite true that *there are no common officers; there is no common stock control,* although it may be, of course, that executives or officials of one or more of them hold some listed stock in the others.", but as to those, "We do not attach any significance to them." (R. 216).

We know of no case where the properties and revenues of five separate companies have been *aggregated,* treated as a unit, and held to be a monopoly of a particular industry.

Furthermore, we have searched in vain among the arguments of Government's counsel for a definite statement purporting to justify what is otherwise nothing more than an assumption of the right to aggregate. The only indication of any such rationale in the Government's brief in the District Court was as follows (Gov't. brief, p. 20):

> "The constant use by most of the affiliated theatres of films distributed by two or more producer-exhibitors in important situations tends to induce them to select each other as their first run outlets. This is not because the negotiations by the theatres of A for the films of B are expressly conditioned upon similar negotiations by the theatres of B for the films of A, but because A and B *have a natural community of interest* as both distributors and exhibitors in seeing that the market for the products of both is not disturbed by outsiders interested only in theatre operations."

This theory is carried over in the Government's present brief at pages 56-57, where counsel state: "Each of the defendants selected not only its own theatres but also those of the other defendants for first-run showings * * *."

Although nowhere clearly defined the Government's contention, as we understand it, is that there exists some sort of nation-wide practice among the five producer-exhibitors whereby each of the five, as distributor, favors the theatre of a co-defendant over that of an independent in return for similar treatment where the distributor itself operates a theatre. Apparently in the desire to create a further atmosphere of opprobrium, counsel refer to this alleged practice as "cross-licensing."

corporations entitled to the same of the stock which had been turned over to the New Jersey company in exchange for its stock."

In *United States* v. *American Tobacco Co.*, 221 U. S. 106, the principal subject organization was again a corporation, *created* to acquire the properties of five distinct concerns which manufactured, distributed and sold in the United States and abroad, 95% of all the domestic cigarette tobacco produced in the United States. It thereafter acquired ownership of other companies, thus obtaining for itself a dominant position in all branches of the tobacco industry. This Court in decreeing dissolution, pointed to the fact that "the very first organization" was created as a result of and to eliminate competitive conditions (221 U. S. at 182).

In the *Reading* cases (*United States* v. *Reading Co.*, 226 U. S. 324 and 253 U. S. 26), according to the Court's opinion in the later case, *a holding company was organized* to provide "complete dominion over two great competing interstate carriers and over two great competing coal companies" (253 U. S. at 59).

United States v. *Aluminum Co. of America*, 148 F. (2d) 416 (C. C. A. 2d), on the other hand, is an example of the second type of monopoly where divestiture has been held the appropriate remedy. There, a single company monopolist, Aluminum Company of America, through alleged exclusionary practices maintained a monopoly of all the virgin ingot aluminum produced in this country and a monopoly amounting to 90% of all aluminum (*i.e.* its own, second, scrap and imported). Divestiture in that case meant the fission of a single organization into competing units which had not previously been separate.

It is altogether clear that Loew's does not come within either group of cases in which the remedy of divestiture is the required relief, for the reason that neither its integrated business nor any part thereof is an illegal monopoly.

Furthermore, in the industry at bar there already exist the separate autonomous companies which the remedy of divestiture is designed to provide. The only relief, which could be warranted is a decree such as that which the District Court has rendered, guaranteeing competition among these companies as well as other units in the industry.

(b) "Cross-licensing" is but an empty catchword—the Government's claim that the producer-exhibitor defendants do not compete with each other is not applicable to Loew's.

The customary meaning of the expression "cross-licensing" as indicated by this Court in the "cracking" case, *Standard Oil Co.* v. *United States*, 283 U. S. 163, 171, is "An *interchange* of patent rights and a division of royalties according to the value attributed by the parties to their respective patent claims" and as the Court said, "is frequently necessary if technical advancement is not to be blocked by threatened litigation."[1]

It is clear that the Government in using this term "cross-licensing" throughout the case is seeking to create the impression that there exists here the "interchange" aspects present in the customary agreement for exchange of patent or other rights. In other words, counsel seek to create a picture of a group of competitors pooling licenses either to reduce the competition between them or to advance the development of a single product from which the group will

[1] A true cross-licensing situation is that described by the Court in *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386, 400:

> "In summary, the situation brought about in the glass industry, and existing in 1938, was this: Hartford, with the technical and financial aid of others in the conspiracy, had acquired, by issue to it or assignment from the owners, more than 600 patents. These, with over 100 Corning controlled patents, over 60 Owens patents, over 70 Hazel patents, and some 12 Lynch patents, had been, by cross-licensing agreements, merged into a pool which effectually controlled the industry. This control was exercised to allot production in Corning's field to Corning, and that in restricted classes within the general container field to Owens, Hazel, Thatcher, Ball, and such other smaller manufacturers as the group agreed should be licensed. The result was that 94% of the glass containers manufactured in this country on feeders and formers were made on machinery licensed under the pooled patents."

benefit. Such an impression, so far as this industry is concerned, could not be more completely false.

At the outset it should be made clear: the five companies *never* license each other to act as distributors of their respective motion pictures. Each is in open competition with all the other seven distributors to "sell" its features to as many theatres as possible.[1] There literally is no "cross-licensing" between the five competing companies as distributors. Each does its own distributing to the exclusion of the others, and each copyright of each defendant for each of its pictures has nothing at all to do with the copyright of any other defendant for any of its pictures.

The same is true on the exhibition level. The business of exhibiting motion pictures is obviously a local one.[2] It is carried on in thousands of segregated markets—the "Main

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[1] District Court Opinion, R. 3554:

> "Outside the limits of the trade practices and agreements which we have found to violate the anti-trust laws and which will under the final decree be abolished, *there is general competition among all the defendants as well as between them and independent distributors for the exhibition of their various pictures.*"

Government's counsel, in attempting to establish that the theatres of the major defendants do not compete with each other for product, state twice in their brief (pp. 18, 66) that William F. Rodgers, Sales Manager of Loew's, "conceded that there was no competition among the major defendants' theatres in licensing films he sold." In support of this claimed concession the Government refers to R. 572. It is obvious from Mr. Rodger's answer to the next question (R. 573) that in stating that there was no competition for Loew's pictures, he was referring to the situation in those cities where Loew's operates theatres. In those cities, Loew's obviously exhibits its pictures in its own theatres and does not make them available for first-run exhibition to other exhibitors operating there.

[2] "The showing of motion pictures is, of course, a local affair." *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173 at 183.

Streets" of the cities and towns across the country. Thus, Loew's "Colonial" in Reading, Pa. is not in the same competitive market as the "Paramount" in Springfield, Mass. The two markets of *exhibition* are wholly separate and distinct. This segregation of markets is of fundamental significance in the industry at bar.

While the five producer-exhibitors own and operate theatres across the country, in any local exhibition market where two or more of them are operating first-run theatres, two or more producer-exhibitors never license *each other's* theatres. They exhibit the first-run of their pictures exclusively in their own theatres.[1] Consequently, there is no "cross-licensing" between these five companies on the exhibition level. Whenever they are operating as exhibitors, they are in open direct competition with each other—undiminished by any license agreements between them.

In an effort to prove that the producer-exhibitor defendants do not compete with each other as exhibitors, the Government states in two places in its brief (pp. 16, 55-56) that of the 922 towns in the country in which defendants own theatre interests there are *only* 47 towns (5%) in

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[1]Loew's sales manager, William F. Rodgers, testified (R. 442-3):

> "Q. Do your theatres always exhibit your own Loew's films? Put it this way: Do Loew's theatres always exhibit Loew's films? A. With one exception.
>
> Q. What is the exception. A. The exception is in Niagara Falls where we have an interest in a theatre in Niagara Falls but our product is played in the theatre of an independent exhibitor."

Government Brief in District Court, p. 19:

> "It appears to be conceded that each distributor normally selects the theatre in which it has a financial interest as its own first-run outlet in the communities where they are located."

which the theatre interests of two or more defendants are "operating in nominal competition with each other." So far as the defendant Loew's is concerned, this statement is so inaccurate as to be absurd. Loew's operates theatres in 42 cities in the United States. (Appendices II and III of this brief.) In 32 of such cities Loew's competes with the theatres of one or more producer-exhibitors. Thus, in 71%, not 5% as the Government asserts, of the cities where Loew's operates there are theatres of one or more of the other producer-exhibitors. In the remaining 10 cities where Loew's operates, without competition from the other producer-exhibitor defendants, there are one or more competing independent first-run theatres. (Appendices II and III of this brief.)

The foregoing establishes, so far as the defendant Loew's is concerned, not only that it is in competition on the exhibition level with the other producer-exhibitors but that the Government's technique of aggregate statistics gives an entirely false picture as to Loew's own situation.

It is, of course, true that when a producer-exhibitor has no theatre in a locality and another producer-exhibitor has, the former may license its pictures for exhibition in the theatre of the latter. This, however, in no way lessens competition as among the five companies here involved. For example, if Paramount licenses a feature or features to Loew's "Colonial" in Reading, Pa., that licensing does not reduce the competition between Loew's and Paramount as exhibitors, for Paramount has no theatre competing in that area, or it would not be licensing another theatre, such as Loew's "Colonial". In this situation, however, the Government claims that there is a pattern of a mutual interchange of interest whereby one producer-exhibitor favors the the-

atre of another over that of an independent in return for the latter favoring the theatre of the former in a different locality. We shall show that as to Loew's this claimed reciprocity does not exist.

(c) There is no pattern of conduct, on the part of the defendant Loew's in dealing with the other four producer-exhibitors, evidencing a plan among them to exchange first-run privileges.

If the defendant Loew's were a party to a nation-wide scheme among the five producer-exhibitors to use each other's theatres as their first-run outlets in preference to, and to the exclusion of, more suitable *independent* theatres, one would expect to find some evidence of the results of such a reciprocal arrangement—a pattern of mutual benefit, one to another, among the five producer-exhibitors. Indeed, without some evidence of that nature there certainly can be no inference of any collective action which would sustain the Government's *aggregation* of these five autonomous companies.

However, in view of the District Court's conclusion that these companies could not be treated "collectively" (Opinion, R. 3553) it is not surprising to find that there is absolutely no proof of reciprocity. Both the testimony[1] and the documentary proof is directly to the contrary.

In the majority of the 36 cities of over 100,000 population where Loew's operates first-run theatres *none* of the other four producer-exhibitors licensed Loew's theatres to the extent of more than three features a year. In this regard, the lower Court found (R. 3686):

> "131. In 21 of the 36 out of the 92 cities where Loew's operates theatres *none* of the other four producer-exhibitors licensed its features in the 1943-

[1] R. 535, 685, 1110, 1512, 1725, 1843 and 1849.

44 season for first-run exhibition in a Loew's theatre, to the extent of more than three features, the Loew's theatres' first-run exhibition being otherwise limited to its own features and those of non theatre-owning producers."

Further proof that there is no pattern or practice of reciprocal interchange of benefit among these five competing companies is the situation in Indianapolis, Louisville, St. Louis and Harrisburg. In those cities Loew's operates the only affiliated first-run theatres. All the competing first-run theatres are independent. (Appendices II and III.) It is of compelling significance that in every one of those four cities Loew's did not have the product of a *single one* of the other four producer-exhibitors. Instead, in each city, all four, Fox, Paramount, RKO and Warner, license the independent first-run theatres to the exclusion of Loew's. (Appendices II and III.)

If there were any doubt as to the fact that Loew's is not engaged in any mutual interchange of benefits with the other four producers-exhibitors, it is conclusively determined by Loew's course of action over the past ten years. During that time Loew's has moved away steadily from the other producer-exhibitors' product toward that of non-theatre-owning distributors. The lower Court so found (R. 3686):

"132. Over the 10 years from 1935 to 1945, the total number of features licensed by the other four theatre-owning distributors to Loew's first-run houses, *decreased* from 1382 to 998 and the features of non theatre-owning distributors, *increased* from 1201 to 1879."

"133. In 1935, the other four theatre-owning distributors earned $2,611,986 from Loew's thea-

tres and the non theatre-owning distributors earned $2,205,330 ($406,656 less). In 1944, the non theatre-owning distributors earned $5,261,116 in Loew's theatres, which was $419,477 more than the $4,841,639, earned in Loew's theatres in that year by the four other theatre-owning distributors."

In view of these facts disproving a mutual interchange of first-run benefits between Loew's and the other producer-exhibitor defendants, there is no basis whatever for the Government's use of aggregated statistics and inferring therefrom a collective monopoly in exhibition (Opinion, R. 3553).

(d) With the disproof of any basis for aggregating the first-run theatres of the five producer-exhibitors, any collective monopoly of distribution must likewise fail.

Proceeding on the basis of aggregating the first-run theatres of the five producer-exhibitors, a premise which we have shown to be false, the Government's theory for a collective monopoly of distribution is that since the first-run theatres of these five companies are to be treated as a unit, the film rentals paid by the theatres of each of them to the five companies, as distributors, should be viewed in the *aggregate*.

So far as the defendant Loew's is concerned, the effect of this latter aggregation is as follows: Loew's theatres pay 71% of their total film rental to Fox, *to Loew's itself* to Paramount, to RKO and to Warner (Find. 127, R. 3685). The crux of this situation, of course, is what Loew's pays to itself. Without including this portion, Fox, Paramount, RKO and Warner, even in the aggregate, receive but a small portion of the total film rentals paid by Loew's theatres.

In view of the utter demolition of the Government's theory for aggregating the first-run theatres of these five companies, we submit that there can be no justification for lumping the film rentals which Loew's theatres pay to itself, with those that its theatres pay for licensing for exhibition the features of Fox, Paramount, RKO and Warner.

How illusory this method is for proving monopoly, is well demonstrated by the District Court's specific finding with respect to the film rentals paid by Loew's in the year 1944. The District Court found (R. 3687):

> "135. In the year 1944, of the total film rental paid by Loew's theatres, 47.9% was *to Loew's itself* for the exhibition of Loew's pictures, and 27.1% was to non theatre-owning distributors. Thus a total of 75% of all film rentals paid by Loew's theatres went to persons other than the four other defendant-producer-exhibitors."

Further indicating the absurdity of this method of establishing monopoly by mere addition, is the lower court's finding that Loew's theatres actually paid higher rentals in 1943-44 to the non-theatre-owning distributors than it did to Fox, RKO and Warner. The lower court found in this regard (R. 3686-7):

> "134. In 1944, the percentage of the total film rental paid by Loew's theatres to each of the non theatre-owning distributors, Columbia (8.8%), United Artists (8.3%) and Universal (7.4%), was *higher* than that paid to each of three producer-exhibitors, RKO (2.1%), Warner Bros. (2.1%) and Twentieth Century Fox (6.1%).

We submit that the District Court was entirely justified in finding that there is no *collective* monopoly of exhibition, and, as a consequence, refusing to find a *collective* monopoly of distribution. Under recognized authorities there is neither need nor justification for disturbing the lower court's decision in that regard. *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 182-3; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 477; *Adamson* v. *Gilliland*, 242 U. S. 350, 353.

In the *Alabama Power* case, this Court said:

> "These findings were made, after hearing, by the district judge upon undisputed or conflicting evidence. The findings were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as unassailable. *Davis* v. *Schwartz*, 155 U. S. 631, 636-637; *Adamson* v. *Gilliland*, 242 U. S. 350, 353."

Point II

THE DISTRICT COURT DID NOT ERR IN DENYING DIVESTITURE.

(On the Government's Appeal No. 79)

A. Absent Monopoly, Divestiture is Wholly Unwarranted.

We know of no case where a court has ever held that, absent monopoly, the *Sherman Act* required a completely autonomous company such as Loew's to cut off a major part of its integrated business.

Here in the case at bar, the District Court has affirmatively found that Loew's has no monopoly of exhibition *individually*, or *collectively* with the other producer-exhibitors.

As we have indicated previously, the Government in this Court has made a fundamental change in the theory of monopoly upon which it bases its claim to divorcement. Even if it were successful in establishing a collective monopoly of the five companies, the only appropriate relief, in view of the illegalities found by the District Court, would be a decree enjoining the illegal restraints found, but leaving each integrated company untouched. Apparently aware of this, counsel no longer argue for the collective theory, but only contend in this Court for the proposition that each integrated company is in and of itself an illegal monopolization.

We have shown that neither the *Lehigh, Reading, Yellow Cab, Swift*, nor any other case, supports this improvisation.

Divestiture, of course, is not a penalty specifically prescribed by statute for violations of the Sherman Law. Nor

is there any justification for its use to reduce all participants in a given field of endeavor to a level of equal competitive strength. Its sole use as a tool of equity has been to dissolve the definite recognizable monopoly. Hence, the cases where divestiture has been decreed are limited to two types, the *first*, where companies or properties have been unlawfully combined to create a monopoly, and the *second*, where a single organization has *legally* attained what amounts to a monopoly of a given industry or a part of a given industry but is actively maintaining that position in violation of the Sherman Act. In the first situation divestiture means the breaking up of the illegally created organization and the return of its units to their former separate status. In the second situation divestiture means the fission of a single organization into several units which never have been separate.[1] In either circumstance, however, the application of divestiture is limited to dividing a unified organization, comprising the monopoly, into separate units.

Typical of the former class of cases is *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173. There, it will be recalled, the Crescent Amusement Company and its subsidiary and affiliated theatre companies (none of which was related to any of the defendants at bar) were found to have created and maintained "an unreasonable monopoly of the business of operating theatres in the towns of Tennessee, northern

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[1]The restricted scope of the remedy of divestiture, thus defined, was exactly that stated by the Government in its application to this Court to obtain the deletion of the sentence from the opinion *in U. S.* v. *National Lead Company*, 332 U. S. 319, which reads:

> "Existing precedents of divestiture provide examples of the restoration of a pre-existing separate status to companies or properties which have been unlawfully combined rather than to the fission of units which have never been separate."

Alabama, and central and western Kentucky" and to have followed the practice of insisting that a distributor give them monopoly rights in towns where they had competition or else they would not give the distributor any business in the closed towns where they had no competition. This Court, in referring to the evidence of the defendant circuit's predatory practices, stated, "The mere threat would at times be sufficient and cause the competitor to sell out to the combination 'because his mule was scared.' In that way some of the [Crescent] affiliates were born" (323 U. S. at 181).

Not only is there no such evidence in the case at bar, but in affirming the District Court's judgment of dissolution of the Crescent organization this Court specifically pointed out (323 U. S. at 189):

> "The Court has quite consistently recognized *in this type* of Sherman Act case that the government should not be confined to an injunction against further violations. Dissolution of the combination will be ordered *where the creation of the combination is itself the violation.*"

Another case where *the creation of the combination* was itself the violation is *Standard Oil Co.* v. *United States*, 221 U. S. 1. There the subject organization was a corporation organized to acquire and hold the stock of operating companies controlling 90 per cent of the business of producing, shipping, refining and selling petroleum and its products. In affirming the lower court's decree granting dissolution, this Court pointed out at page 78:

> "It [the lower court decree] commanded the dissolution of the combination, and therefore in effect, directed the transfer by the New Jersey corporation back to the stockholders of the various subsidiary

B. Divestiture Is No Remedy For the Illegalities Found.

The gravamen of the illegalities found in the case at bar are not in the ownership of theatres but in methods of doing business, in trade practices engaged in by eight of the largest companies in the industry. There is here no proof of a nation-wide effort to take over all theatre operations, nor is there any indication in the case at bar that Loew's entered upon the business of production and exhibition of motion pictures for the purpose of monopolizing either of those fields or any particular locality in which it operates. In this regard the District Court specifically found (R. 3689-90):

> "152. There is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly either in production, distribution, or exhibition of motion pictures, except as found in findings 153 and 154 below.
>
> "153. In localities where there is ownership by a single defendant of all the first-run theatres [1], there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of the competitors, their lack of financial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from 'inherent vice' on the part of these defendants.
>
> "154. The illegalities and restraints herein found, are not in the ownership of many or most of the best theatres by the producer-distributors, but

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[1] In no place where Loew's operates, does it own or operate all the first-run theatres (Find. 119; R. 3684; Appendix III to this brief).

in admission price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals, master agreements, franchises, block-booking, pooling agreements and certain discriminations among licensees between defendants and independents. *These practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five exhibitor defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited.*"

It is clear from these findings that the arbitrary severance of production from exhibition, sought by the Government, would not remedy the trade practices found illegal by the District Court. As that Court itself found (R. 3690);

"156. Total divestiture would not remedy the price-fixing, systems of clearance, formula deals, master agreements and franchises, block-booking, pooling agreements and the other practices which have been found unreasonably to restrict competition."

If, in equity, it still is "an object all sublime, to have the punishment fit the crime", there is no rational justification for the intransigent demand of Government counsel for the nation-wide breaking up of five of the principal units operating in an industry.[1]

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[1]In relying upon the past history of litigation with respect to the motion picture industry, as the Government's brief does on pages 72-89, and in claiming that this demonstrates need for divorcement, the Government completely disregards the controlling fact that until the judgment in the present case, the conduct of the defendants has never been subject to such drastic prohibitions and mandates as are imposed by this decree. Never before were there any injunctions against the insertion in licenses

In view of the findings, above quoted, the opinion of this Court in *U. S.* v. *National Lead Co., et al.*, 332 U. S. 319, 338, and 352-3, is of first importance.

> "This is a civil, not a criminal, proceeding. The purpose of the decree, therefore, *is effective and fair enforcement, not punishment. An understanding of the findings of fact* is essential to an appreciation of the reasons for the decree.
>
> * * * * *
>
> *There is no showing* that four major competing units would be preferable to two, or * * * that six would be better than four. *Likewise, there is no showing of the necessity for this divestiture of plants or of its practicality and fairness. The findings of fact have shown* vigorous and effective competition between National Lead and du Pont in this field. * * * Such competition suggests that the District Court would do well to remove unlawful handicaps from it *but demonstrates no sufficient basis for weakening its force by divesting each of the two largest competitors of one of its principal plants.* It is not for the courts to realign and redirect effective and lawful competition where it already exists *and needs only to be released from restraints that violate the Anti-Trust Laws.* To separate the operating units of going concerns *without more supporting evidence than has been presented here* to establish either the need for, or the feasibility of, such separation *would amount to an abuse of discretion.*"

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of minimum admission prices or against the use of formula deals and master agreements. Nor has there ever been anything like the requirement of picture by picture and theatre by theatre licensing or the requirement of competitive bidding, or the injunction against arbitrarily refusing the demand of an exhibitor for the run demanded by him. None of these cases relied upon by the Government even purported to provide such remedies as the District Court has decreed in the present instance.

C. Prohibiting the Theatre of a Producer-Exhibitor from Exhibiting a Feature Distributed by Another Producer-Exhibitor is Divorcement by Indirection and was Properly Denied.

The Government makes the following assignment of error (R. 3721):

> "5. The Court erred in failing to prohibit the continued use by the major defendants of each other's theatres as exhibition outlets for each other's films."

This demand for an outright proscription against the theatre of a producer-exhibitor exhibiting a feature distributed by another producer-exhibitor, comes as a complete afterthought in the case at bar. It was not mentioned in the amended and supplemental complaint upon which the hearings in the District Court were held. It was not mentioned in the application for modification of the consent decree, which led to those hearings. It was not mentioned in the opening of Government's counsel in the District Court, nor during the hearings. Nor was it ever mentioned in any brief filed by the Government either before or after the hearings. It was raised by Government counsel for the first time during the *closing* arguments at R. 2568 and only after the District Court, following the completed trial and receipt of briefs, expressed the view (R. 2560):

> "Judge Hand: You seem really to aim at, I won't say nothing, because you are calling attention now to other wrongs, but your great aim is to upset all the ownership of theatres. Now that is an extremely drastic remedy that I should think was extremely unlikely for this court to give. But that

> is merely a first impression by myself, and I have got to study this thing very carefully in other ways than just by reading through the briefs once, of course."

The obvious purpose of this last-minute innovation was to accomplish indirectly what was proven so overwhelmingly to be unwarranted in this case; that is, divestiture. And Government counsel acknowledged as much, on being pressed by the court as follows (R. 2570):

> "Judge Hand: Now you are arguing for this *different remedy* and really not arguing for the situation where it might well be said, as they said about Agricola, he made a desert and called it peace.
>
> Mr. Wright: I am merely suggesting that as an alternative remedy. I do not think myself that it is as adequate a remedy of dissolution. *But I point it out as simply another means of attempting to accomplish the same results;* and I say there is nothing in the defendants' attitude to indicate that they would not regard restrictions of that character as any more desirable than the more traditional method of an actual dissolution of these combinations through stock divestiture."

The devastation which this arbitrary proscription would work on this industry cannot be exaggerated.

The Government concedes (Gov't. brief, p. 99) and the District Court found (R. 3689):

> "151. Except for a very limited number of theatres in the very largest cities, the 18,000 and more theatres in the United States exhibit the product of more than one distributor. *Such theatres could not be operated on the product of only one distributor.*"

It is obvious, therefore, that this proposal means that Loew's will be obliged either to close up for long periods of time numerous of its theatres or to dispose of them in order to avoid bankruptcy.

The punitive effect of such a proscription is brought home with striking emphasis when it is recalled that in no place where Loew's operates does it have market control or anything approaching monopoly either of theatre holdings or of first-run product.

In those limited localities where such a directive would not compel divorcement on the part of the defendants it would have in addition a serious trade-restraining effect, that would virtually eliminate the competition which the Sherman Act is intended to promote.

In a typical town where an affiliated theatre would be competing with one or more independent theatres[1] the product of the other producer-exhibitors would be carved out of the competitive field and delivered to the independent protected by what would amount to a perpetual franchise. On the other hand, the product of the three non-theatre-owning defendants and non-defendant distributors would naturally be relegated to the theatre of the producer-exhibitor in such locality, again without any competition therefor from the independent exhibitor in that locality, for the simple reason that the independent exhibitor would have the perpetual franchise to which we have referred.

This "channelized" licensing would be nothing more than preserving the "evil" which the suit ostensibly was brought to destroy, and thus indicates the extremes to

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[1]Of the 36 cities of over 100,000 population where Loew's operates first-run theatres there are 21 with competing independent first-run theatres (Find. 149; R. 3689).

which Government's counsel are willing to go to obtain their only goal—divestiture.

In *Bigelow* v. *RKO Radio Pictures, Inc., et al.*, the District Court decreed a fixed-run position for tne theatres of the plaintiff, an independent exhibitor. In reversing, the Circuit Court of Appeals for the 7th Circuit stated 162 F. (2) 520, 524:

> "Thus the plaintiffs seek by the decree a favored fixed position in the scheme which they have sought to destroy, and this on the ground not of the illegal conspiracy but on the ground that the court found they were at an economic disadvantage with the defendant Balaban & Katz Corporation, who owned and operated the Maryland Theatre, because of this defendant's bargaining power as the operator of a chain of theatres. The decree may very properly be used to destroy the conspiracy root, branch, and all its evil fruits, but it may not be used to redress the economic balance between the plaintiffs and the said defendant without a finding that that difference was related directly to the conspiracy. It has been the plaintiffs' contention, as we understand it, that no one has a vested right in a playing position. In this we agree with the plaintiffs. The plaintiffs have a right to compete for any playing position, but they have no right to be awarded and protected by decree in any certain position. If the plaintiffs find themselves at a disadvantage because the defendants are economically stronger inasmuch as they are a chain with large bargaining power, the plaintiffs may not, without any finding to support it, obtain a decree vesting them and protecting them in a privileged position ahead of the Maryland Theatre. This does not

appear to us as using the decree to destroy the conspiracy, but rather to preserve the evil in the interest of the plaintiffs."

If this proscription against a theatre of a producer-exhibitor exhibiting a feature of another producer-exhibitor is demanded by Government's counsel for any other purpose than as a subterfuge for divestiture, it can only be to obtain Sherman Act compliance, i.e., to eliminate the conspiracy and restraints of trade which have been found, and to insure competition.

But Government's counsel cavalierly proceed in their argument in support of this new-found substitute for divorcement as though the District Court had entered no decree, where, in fact, it has imposed severe restrictions and curbs on the defendant's freedom of action carefully designed to cure every illegality found and to guarantee competition.[1]

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[1]An indication of the tenuous basis upon which the Government argues for this drastic relief is given on pages 128 and 129 of their brief. In claiming that the alleged illegalities would continue, even without written agreements the Government refers to a particular incident where Paramount the distributor and Loew's the exhibitor came to a serious disagreement in their negotiations for the licensing of Paramount pictures in Loew's theatres in New York City. The Government claims that this dispute had the effect of delaying subsequent run exhibition even though there was no contract in existence. As a result of this deadlock Paramount refused to license to Loew's its pictures from sometime in January, 1945 to sometime in May, 1945, a period of four or five months. If this evidence shows anything it proves that the alleged conspirators were not conspirators at all, for the proof establishes that Paramount during this fight was making extensive surveys to procure other outlets (R. 813).

Similarly, the exhibits referred to on page 120 (Exhibits 243 and 250) as evidencing "net-profit-sharing license agreements"

The manner in which the District Court has completely eliminated the possibility of any illegality resulting from the licensing by one producer-exhibitor of its pictures for exhibition in a theatre of another and the Government's contentions to the contrary are considered in detail in the next point dealing with the adequacy of relief decreed by the District Court.

The District Court's judgment denying total divestiture should not be circumvented by the licensing prohibition now demanded. This judgment, providing injunctive remedies and denying the Government's demand for divestiture was only entered after weeks of hearings and days of argument directed both to the legality of the practices involved and to the appropriateness of the relief prescribed. Furthermore, the District Court has specifically reserved jurisdiction to modify at any time its decree (Judgment, VIII; R. 3701). In view of the care and attention which has been devoted by this District Court to the question of relief

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will on examination show that they were in fact not profit-sharing license agreements at all. In this connection, it is to be noted that Exhibit 243, as reproduced on page 59 of the Government's Appendix as "Master agreement for Paramount films in Loew theatres", under the heading "Examples of License used by Defendants in Dealing with Each Other" is absolutely incorrect because it is not a license agreement at all but merely represents an exchange of correspondence settling a dispute concerning license fees covering feature pictures previously exhibited. This settlement was arrived at after an extended audit which Paramount insisted upon and finally was successful in procuring (R. 809, 810).

This same Exhibit 243 is again summarized at page 91 of the Government Appendix. In designating this as a license agreement and so describing it, the summary is grossly misleading. It is *not* a license agreement. The Government does not refer to the two real license agreements which are in fact contained in Exhibit 243. Each such license agreement covers *one feature picture only.*

in the case at bar, this Court's recent opinion in *International Salt Company* v. *United States* (No. 46, this Term) is most apposite. There the Court said:

> "The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 185; *United States* v. *National Lead Co.*, U. S. . *In an equity suit, the end to be served is not punishment of past transgression,* nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints."

Point III

THE INJUNCTIVE RELIEF DECREED BY THE DISTRICT COURT IS ENTIRELY ADEQUATE TO ELIMINATE ANY ILLEGAL RESTRAINTS IN DISTRIBUTION OR EXHIBITION.

(On the Government's Appeal No. 79)

Loew's has appealed from the District Court's findings and conclusions of conspiracy and from most of the findings and conclusions as to unreasonable restraints. The argument in support thereof is set forth in the appellant's portion of this brief (Points IV *et seq.*, p. 113). In presenting Loew's argument that the injunctive relief decreed by the District Court is entirely adequate to eliminate any restraints in distribution or exhibition, we do so entirely on the basis that, assuming the findings and conclusions are correct, the relief is entirely adequate to cure all the illegalities.

A. Any Violation of the Sherman Act With Respect to Theatre Admission Prices Has Been Eliminated by the Judgment.

The nature of the "illegality" as to theatre admission prices.

It has been the practice in the past for all defendants including the eight distributor defendants to agree with each of its respective licensees that the licensee should charge no less than a stated admission price during the exhibition of the feature licensed. (See Find. 62, R. 3670.) The lower court found that the minimum admission prices included in the licenses of each of the eight distributor defendants for any

given theatre are in general uniform, "being the usual admission prices currently charged by the exhibitor" (Find. 63, R. 3670).

The District Court concluded that this provision as to minimum admission prices, when included in thousands of license agreements, had the effect of creating a fixed rigid structure of admission prices, not only as between the distributors and their various exhibitors, but as between all exhibitors in the area and as between the distributors themselves (Find. 71, R. 3672).

The court also took the position that the purpose and effect of this requirement of minimum admission prices is to encourage as many patrons as possible to see a feature in the prior-run theatres where they will pay higher prices than in the subsequent runs (Finds. 66, 72; R. 3671, 3672-3).

The lower court's conclusions of law (Nos. 7(a); 8(a) and (b); 9(c) and (d); R. 3691-3), followed a similar pattern, holding that these agreements of the distributor-defendants with their respective licensees violate the Sherman Law.

It should be made clear that the situation created by agreements as to minimum admission price has no relation to whether the distributor defendants should or should not own theatres. While the lower court found that Fox, Loew's, Paramount, RKO and Warner had an interest in maintaining subsequent run minimum admission prices in the areas where they owned theatres (Find. 66; R. 3671), this interest exists on the part of any prior run exhibitor, no matter who might own or operate the theatre. The prior run always has the desire to attract the greatest number of admissions away from the subsequent and into the

prior run. Thus the distributors' practice of including a provision as to minimum admission prices in license agreements is common to affiliated and independent theatres alike. As the District Court said in its opinion (R. 3518):

> "The agreements [as to minimum admission prices] are not only between the distributor-defendants and other defendants owning theatres, but also between the distributor-defendants and independent theatre owners."

It should be obvious therefore that the separation of distribution and exhibition would work no elimination of the rigid admission price structure. Assuming such a condition to exist, this can only come through a prohibition against agreement between distributor and licensee as to the admission price which the latter shall charge at the exhibition of the feature. In this way, even where a distributor owns a prior run theatre it would be impossible for that distributor to restrict any competition as to admission prices which a subsequent run theatre might desire to exercise against the prior run house of the distributor. And this is exactly the remedy which the lower court has applied.

The remedy prescribed with respect to theatre admission prices.

Section II, paragraph 1 of the judgment (R. 3695) enjoins "each of the defendant distributors"

> "From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means."

It is respectfully submitted that this prohibition not only dissolves any "fixed system" as to theatre admission prices, but effectively takes care of every restraint or combination predicated on theatre admission price fixing.[1] Thus, every finding of fact[2] and every conclusion of law,[3] holding that the defendants, including Loew's, have acted illegally with respect to theatre admission prices, have been met completely by the decree.

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[1]The Government charges on page 67 of its brief that while the judgment prohibits price-fixing, clearance largely controls the ability to charge higher prices, and by the distributor's control of the clearance of the prior run the admission prices of the subsequent run can be indirectly controlled. The fallacy in this argument is that the distributor does not have uncontrolled discretion concerning clearance agreements. The judgment, as well as the opinion of the District Court, specify clearly the guideposts to reasonable clearance. The imposition by a distributor of unreasonclearance for the purpose of compelling a subsequent run exhibitor to lower his admission price, or for any other purpose, would clearly therefore be a violation of the decree.

[2]Findings of Fact, Nos. 64 to 72, 84 and 154 (R. 3670-3, 3674, 3690).

[3]Conclusions of Law, Nos. 7(a), 8(a) and (b), and 9(c) and (d) (R. 3691-3).

B. Any Violation of the Sherman Act With Respect to Clearance Has Been Eliminated by the Judgment.

The nature of the "illegality" as to clearance.

While the lower court sustained the legality of clearance *per se* (Opinion, R. 3530-2), it found that the distributor defendants have acquiesced in and formed a uniform system of clearances and "in numerous instances have maintained unreasonable clearances to the prejudice of independents" (Find. 79, R. 3674). The gravamen of the lower court's finding as to clearance is not unlike that with regard to admission prices; that is, the distributor defendants have utilized over-long periods of clearance, in the same manner as maintenance of minimum admission prices, to restrict the competition which subsequent runs might otherwise give to prior exhibitors. In other words, by holding back the later exhibition date and requiring the exhibitor to maintain its admission price, the District Court concluded that greater patronage is funnelled into the more profitable prior exhibition (R. 3533).

One of the principal factors which the lower court relied upon in its condemnation of unreasonable clearances was the *methods of the licensing that prevent changes* in clearances which are unreasonable in length.

As evidence of this the lower court pointed to distributors' franchises, master agreements and formula deals. In describing the stabilizing effect that these methods of licensing have upon clearances, the lower court said (Opinion, R. 3537):

> "Many of the franchises, master agreements, and so-called 'formula deals' which are in evidence provide that clearances shall be the same as those in effect on the date of the agreement. * * * Some of the agreements establish clearances for more than a sea-

son. * * * Others provide that the clearance is to be no less favorable to the exhibitor than that which had been granted by the distributor for the previous season or in the preceding agreement."

The remedy prescribed with respect to clearance.

In the first place, the judgment enjoins all defendants from making or further performing any franchises, formula deals or master agreements. (Judgment, II, pars. 5 and 6, R. 3696.) Henceforth, features cannot be licensed on a circuit basis or on the basis of the season's output of a distributor. *Each* feature must be separately licensed to *each* theatre, "theatre by theatre and picture by picture." (Judgment, II, Par. 8, d, R. 3698.) In other words, the fixed stabilized condition of clearances maintained by means of these long term, broad-coverage agreements is dissolved.

In the second place, the judgment specifically enjoins the distributor-defendants from agreeing with each other or with any exhibitors or distributors to maintain a system of clearances. (Judgment, II, Par. 2; R. 3695.)

In the third place, the lower court has prohibited the granting of any clearance "whatsoever between theatres not in substantial competition." (Judgment, II, Par. 3, R. 3695.)

The lower court prescribes a fourth remedy. It prohibits the distributor defendants from

> "granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted." (Judgment, II, par. 4, R. 3695-6.)

Finally, the lower court has provided that "Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the dis-

tributor to sustain the legality thereof." (Judgment, II, par. 4, R. 3695-6).

It is respectfully submitted that the first four injunctions, from which Loew's has not appealed, not only dissolve contractual means whereby clearances were "frozen" but assure the elimination of any fixed system of clearance or of any unreasonable clearances. The final directive, however, is wholly unnecessary to correct any of the illegalities found with respect to clearance. The defendant Loew's has assigned as error (R. 3732) this shifting of the burden of proof, and its argument with respect thereto is presented in Point VII of this brief (p. 139).

Once more it might be noted that theatre ownership on the part of distributors is not the root of this problem. Every distributor is interested in "protecting" as much as possible the more lucrative prior run, regardless of whether the distributor owns or operates theatres, for it is from the prior run that the distributor derives its larger film rentals (which are essential, if great, high-cost pictures are to be produced).

Even if distributors were compelled to give up exhibition, this powerful incentive to limit the competition for the prior run theatre would still remain. Of course, the prior run exhibitor, whether or not it is affiliated with a distributor, has a similar interest.

In other words, the same forces which make for stabilized, uniform and unreasonable clearances would still exist, regardless of who owned or operated theatres. The only effective relief, therefore, is that which prevents distributors and exhibitors from giving vent to these forces—from making the license agreements which create the fixed system of clearances and the unreasonable clearances found by the court below. This is precisely the relief prescribed in the decree.

C. Competitive Bidding and the Injunction Against Arbitrary Refusal to License The Run Demanded by any Exhibitor Will Effectively Prevent any Violation of the Sherman Act with Respect to the Granting of Run.

The nature of the "illegality" as to runs.

A further area in which the Government claimed and the lower court found restraint of trade, is in the selection by distributors of the exhibitors to whom they license the prior runs of their feature pictures. Here again, so far as the court's conclusion is concerned, the fundamental evil lies in the *stabilized, unchangeable* condition with respect to the runs granted by the defendant distributors. As in the case of clearance, a factor contributing to the fixed condition as to runs has been the long-term licensing agreements, such as franchises, and licenses on a circuit basis (e.g. master agreements, formula deals), which preclude consideration of local situations.

Said the lower court in its opinion:

> "Much that has been said about clearances is applicable also to runs; the two are practically alike. Clearances are given to protect a particular run against a subsequent run, and the practice of clearance is so closely allied with that of run as to make comment on the one applicable to the other." (R. 3538).
>
> * * *
>
> "Arrangements whereby all the theatres of a circuit are included in a single agreement, and no opportunity is afforded for other theatre owners to bid for

> the picture in their several areas, seriously and as we hold unreasonably restrain competition. These formula deals have been negotiated without, so far as we have informed, any competition on the part of independent theatre owners who would labor under a great disadvantage in attempting severally to match or outbid the offers of a circuit that was making offers for all of its theatres." (R. 3541)

Also making for the stabilized condition of runs is the distributors' practice of doing business on a given run with a satisfactory "old-customer" in preference to an exhibitor who may have a theatre more suitable for the run theretofore licensed to the old customer. Thus, the District Court held that exhibitors have no fair chance to license the runs to which they are entitled on the merits of the situation.

It was all of the foregoing which led the lower court to make the following findings (R. 3674):

> "82. The defendants have acted in concert in their grant of run and clearance."

> "84. Both independent distributors and exhibitors, when attempting to bargain with the defendants, have been met by a fixed scale of clearances, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with the defendants' theatre or theatres to which the latter had licensed their pictures."

The remedies prescribed with respect to run.

As it did in the case of admission prices and clearance, the lower court, in its decree, has eliminated completely every means which the lower court held had contributed in any manner to the fixed system of runs that it had found. In addition it has affirmatively provided the machinery which effectuates and guarantees competition in the granting of runs to all exhibitors.

To be specific, the court has prescribed four definite remedies. The first is the prohibition against further use of formula deals, franchises and master agreements. (Judgment, II, pars. 5-7; R. 3696). Not only that, but the decree compels distributors to license their pictures theatre by theatre and picture by picture. (Judgment, II, par. 8(d); R. 3698). Thus, contractual techniques, which in the past have precluded the opening up of the run situation are eliminated both by specific prohibition against their continued use and by affirmative direction that each theatre and each picture be handled individually so as to permit comparison on the merits.

The second remedy is a specific prohibition against favoring the "old customers" or "affiliates." Paragraph 8(b) of Section II of the judgment provides:

> "Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others;" (R. 3696-7)

These first two remedies open up the field by laying specific prohibitions on the distributor. The third remedy, while also operating as against the distributor, in actuality gives *to every exhibitor* the affirmative means for obtaining *any* run of a distributor's picture, to which the exhibitor

as against its competitors is entitled on the merits; the only exception being that if a distributor happens to have its own theatre in the area, it can show its own pictures there without observing this requirement. Thus Paragraph 9 of Section II of the judgment enjoins each distributor,

> "From *arbitrarily* refusing the demand of an exhibitor, who operates a theatre in competition with another theatre not owned or operated by a defendant distributor, or its affiliate or subsidiary, made by registered mail, addressed to the home office of the distributor, to license a feature to him for exhibition *on a run selected by the exhibitor*, instead of licensing it to another exhibitor for exhibition in his competing theatre on such run. Such demand shall be deemed to have been refused either upon the receipt by the exhibitor of a refusal in writing or upon the expiration of ten days after the receipt of the exhibitor's demand." (R. 3698)

The effect of this provision is to compel a distributor, under penalty of contempt, to recognize the written demand of an exhibitor for a run to which the latter is entitled on the merits. The exhibitor, by offering terms for any run, which are superior to those offered by any other competing exhibitor will thereby get that run. *Thus, Paragraph 9 of Section II of the judgment, in and of itself, accomplishes a fundamental change in the licensing practices of distributors.* It imposes upon them the obligation to consider the relative merits of competing exhibitors and their theatres and to license the feature accordingly.

It is highly significant, we submit, that the Government has not offered a single argument against the adequacy of this paragraph of the judgment to prevent any discrimination with respect to the granting of run. *Nowhere in its brief does it even refer to this paragraph.*

In addition to all the foregoing the lower court has prescribed "competitive bidding."

It is the view of the defendant-appellee Loew's that the competitive bidding prescribed by the judgment is a machinery laid out by the court to assure further that runs be granted on the merits and that distributors do not arbitrarily determine, on a basis of "old customer", "affiliation" and the like, which theatre shall be licensed a particular run of a particular picture.

In other words, "competitive bidding" affords an *optional* means to an exhibitor, in addition to the written demand of Paragraph 9 of Section II, whereby he can make certain that he is not being discriminated against so far as his run position is concerned. The optional aspect, which we refer to, was specifically mentioned by the lower court in its supplementary memorandum of December 31, 1946, filed with the judgment (see R. 3702). There the court said:

> "In order to meet some of the objections raised at the hearing to the system of bidding for features described in the opinion of the court, we have modified the system there proposed so that competitive bidding will only be necessary within a competitive area and in such an area where it is desired by the exhibitors. In other words, *the decree provides an opportunity to bid for any exhibitor in a competitive area who may desire to do so.*"

This machinery of competitive bidding probably is not perfect in every detail but behind it all is the clear cut principle inherent in Paragraph 9 of Section II of the judgment that the run of a feature must be granted to the exhibitor offering the best terms for it. With this in mind, it is believed that the methods prescribed by the judgment

can be put into effect. After an experimental period, it will be possible to go back to the lower court and point out *with facts derived from experience* where the machinery is weak or requires clarification and wherein it should be changed. It is to be noted that the court has specifically reserved jurisdiction for such a purpose.[1]

At such time as may be appropriate, Loew's will be prepared to offer proof as to its experience with competitive bidding. Following the District Court's proposal of competitive bidding and even though the provisions of the judgment dealing with competitive bidding have been stayed pending the outcome of these appeals, Loew's has been conducting competitive bidding on an experimental basis. The type of proof which it will be prepared to offer is summarized below and the underlying detail is submitted in a schedule under separate cover.

Loew's is licensing its pictures by competitive bidding in 96 situations throughout the United States. This competitive bidding has been and is being conducted in accordance with the principle underlying Paragraph 8, Section II of the District Court Judgment (R. 3696-8), of awarding the feature picture to the exhibitor offering the best terms, without, however, following all the detailed procedure therein set forth. In this bidding, there are 281 theatres involved. The locations of each of these situations, the theatres involved, their seating capacities,

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[1]Judgment Section VIII reads as follows (R. 3701):

"Jurisdiction of this cause is retained for the purpose of enabling any of the parties to the judgment and no others, to apply to the court at any time for such orders or direction as may be necssary or appropriate for the construction, modification, or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief."

the names of their operators, the status of the operator (i.e., affiliated, independent circuit or small independent), and the number of pictures which each theatre has obtained by this method are included in this schedule submitted under separate cover.

In 40 of the 96 situations where Loew's is licensing its features by this method, a producer-exhibitor is involved. Theatres affiliated with Paramount (which opposes competitive bidding; Paramount's Assignment No. 27; R. 3745-6) are involved in 24 of these 40 situations. Theatres affiliated with Fox, are involved in 11 of these situations, with Warner in 7, and with RKO in 2. To date the affiliated theatres have obtained **293** pictures by competitive bidding and the competing independent theatres, **414**.

In 24 of the 96 situations, where independent circuits and a small independent operator are involved, the independent circuits obtained **129** features by competitive bidding and the small independent operator, **212**.

In the remaining 32 situations the bidding occurred between two small independents in 23 situations and between two independent circuits in 9.

None of the foregoing is in evidence in this case. It has all occurred since the date of the District Court's opinion. We emphasize, however, that it represents the kind of proof Loew's will be prepared to offer at such time as it may be appropriate for the District Court to amend or to modify the details or to consider the effectiveness of its decree.

We respectfully submit that this type of evidence, when offered, will be far more useful to a court in evaluating the adequacy of this relief than the untried theories now expounded by Government's counsel in their brief.

As this Court said recently in *International Salt Company* v. *United States* (No. 46, this Term):

> The District Court has retained jurisdiction, by the terms of its judgment, for the purpose of 'enabling any of the parties to apply to the court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of the judgment' and 'for the amendment, modification or termination of any of its provisions . . .' We think it would not be good judicial administration to strike paragraph VI from the judgment to meet a hypothetical situation when the District Court has purposely left the way open to remedy any such situations if and when the need arises. *The factual basis of the claim for modification should appear in evidentiary form before the District Court rather than in the argumentative form in which it is before us.* Nor are we impressed that this will require a multitude of separate applications. Once the concrete problem is before the District Court it will no doubt be able to fashion a provision that will avoid repetitious applications which would be as vexatious to the Court as to the litigants. We leave the appellant to proper application to the court below and deny the relief here, upon the present state of the record, without prejudice."

There is strong indication that much of the *intervenor-amici* objection to the machinery of competitive bidding, and to the court's decree with regard thereto, arises more from the fundamental requirement that pictures should be licensed on a basis which makes them available to all comers, picture by picture and theatre by theatre, than it does to mere weaknesses in the machinery.

In the case of would-be intervenors this criticism of the *machinery* of competitive bidding—which in truth is

an attack on the fundamental proposition of opening up the field of runs—arises from an admitted desire to continue the *status quo*.

As indication of this we respectfully refer the Court to the argument of Mr. Robert T. Barton, of counsel to some 2200 independent exhibitors located in the southern states (R. 2834).

Mr. Barton sought to intervene in the lower court on behalf of these exhibitors, *W. C. Allred et al.* (as he seeks to do in this court) and vigorously opposed the lower court's remedy of competitive bidding. After referring at some length to the problems of *"auction-selling"* (R. 2838 *et seq.*), which is not involved in any event,[1] Mr. Barton pointed out (R. 2841, 2847-8):

> "Under the present system, by the course of barter and trade and negotiation, the smaller houses do get first run pictures. They may have [built up], over a period of years, a course of dealing with some producer which has been beneficial to the producer and beneficial to the exhibitor."
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> * * * *
>
> "Mr. Barton: *As far as I know, no, sir, none of my clients have complained of the present system of doing business,* and they feel that they can by

[1] Mr. Wright for the plaintiff (R. 2879-8): "We have not understood the Court's opinion as advocating the institution of an administered system of *actual auction sales* of motion pictures. We read it merely as advocating a competitive disposition of runs by which two or more competing exhibitors might seek to exclude each other in providing that in order to prevent discrimination in awarding such runs, that the high bid, or high offer, in financial terms, should prevail."

Judge Hand (R. 2897): "We never said it should be put on an auction block anyway."

barter and trade and the sense they may put in their transactions properly and efficiently conduct their negotiations with the distributors.

Judge Hand: *Then fortunately or unfortunately you do not represent the class that objects to the status quo. They are well satisfied.* But there seems to be a very large class that does.

Mr. Barton: As to those—and there may be among my clients—these 20 representatives of two or three thousand theatres, there may be a number of whom I do not know who do object. You asked me if I personally knew. But they have said in meetings that they believe that the other strictures which the Court proposes to impose will be adequate to take care of the situation. They think more harm will result to them from auction selling than will be gained by that."

In addition to speaking for the "old-customer" theory and expressing satisfaction with the *"status quo"*, Mr. Barton disclosed that his clients had been and apparently still were, "violently opposed" to the requirement of picture by picture and theatre by theatre licensing and were in favor of block-booking (R. 2846).

Substantially similar criticism was advanced on behalf of *The American Theatres Association*, another would-be intervenor represented by Mr. Thurman Arnold (R. 2820-2833).

It is against this background of opposition to the fundamental principle of opening up the field of runs to all comers, that these vociferous criticisms to the inadequacies of *the machinery* should be viewed. While the defendant Loew's did not seek nor initiate the competitive bidding outlined in the decree of the court below, it contends that it will

assure competitive licensing of pictures, and accordingly it is willing to try it. It is to be expected that after experience the mechanics can be altered, if necessary, to accomplish the fundamental purpose which the court had in mind, which is to open the field of run to competitive conditions.

In view of the outspoken criticism of "competitive bidding" it is interesting to note that it had its origin in paragraphs 113 and 122 of the Government's amended and supplemental complaint (R. 3173, 3177). In those paragraphs it is alleged:

> "The distributor ordinarily negotiates the rental terms to be paid *without any competitive bidding* and only if an agreement is not reached with the exhibitor with whom negotiations for a certain run are started are negotiations undertaken with a competing exhibitor for that run."
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> * * * * * * * *
>
> "By establishing the runs and protections with respect to all the theatres in the circuit, these franchises deny to other theatres, during their term, *the opportunity to bid for* or to license the runs of pictures covered by such a franchise in competition with the circuit theatres."

In other words, at the time this pleading was filed in 1940 it was the Government's view that the requirements of the Sherman Act demanded that all theatres have "opportunity to bid for or to license the runs of pictures." This relief has now been granted. Its efficacy, when taken with the other injunctive provisions of the decree, can best be determined after a period of experience.

Answering Specific Statements in the Government's Brief Re Competitive Bidding

While we believe that the appropriate time to refute the unsupported assertions included in the Government's brief in opposition to competitive bidding would be in the District Court by competent proof, we cannot permit certain of these contentions to go unchallenged. We shall consider them briefly below.

1.

> "The competitive bidding system has not been suggested or discussed by any of the parties." (Government's brief p. 40)

If the portions of the Government's amended and supplemental complaint quoted on the preceding page did not suggest competitive bidding, it defies the imagination as to what the pleader had in mind.

2.

> "* * * the affiliated exhibitor has the great advantage of the assured supply of its own distributor pictures. The independent has no assured supply and must compete with the affiliated exhibitor for the product of the other distributors." (Government's brief p. 62)

The Copyright Act which gives the right to the copyright owner to exhibit its own product to the exclusion of others is a sufficient answer to this point. Furthermore, the Government's argument is predicated upon an assumption that all competitors should be reduced to the same level. Certainly the Sherman Act was never intended to accomplish this purpose.

3.

"Independents are now in such a weakened bidding position due in large part to the defendants' long continued unlawful conduct that they cannot successfully compete with the major defendants for films." (Government's brief p. 50)

There is absolutely no proof whatsoever in this record even intimating that the independents lack the financial resources with which to bid. There is, on the contrary, affirmative proof in the record that the total number of theatres operating in the United States have increased by 5,471 in the thirteen years preceding the hearings in this case (Exh. L-12) of which approximately 4,800 were independents.[1] Furthermore, at the appropriate time, if it were necessary, Loew's would offer proof that the independent theatres have successfully bid for feature pictures against theatres affiliated with producer-exhibitors, as well as against large circuits.

4.

"'The independent will be attempting to break into a monopolized field against powerful corporations backed by great wealth and resources." (Government's brief p. 62)

In the first place, the characterization "a monopolized field" is contrary to the District Court's holding of no individual or collective monopolization and we have shown that any charges of monopolization against the defendant Loew's is wholly without support.

[1]Cf. Government's Brief, p. 17.

Secondly, the judgment specifically provides that features shall be licensed picture by picture and theatre by theatre and solely upon the merits and without discrimination in favor of affiliates, old customers or others. (Section II, 8 (b) and (d); R. 3697-8)

On the appropriate occasion, Loew's will be prepared to demonstrate by *proof* that the independent has been able to bid successfully for pictures.

5.

> "Finally, in many cities it will be difficult, if not impossible, for the independents to obtain theatres." (Government's brief p. 63)

Again, there is absolutely no proof in the record to sustain this assertion. Indeed, it is directly contradicted by the evidence of the vast increase in the number of operating theatres for over a decade preceding the hearings in this case. (Find. 145; R. 3688)

6.

> "But; undoubtedly, the majors will continue to do business with the same distributors as before and simply out-bid the independent, thereby preventing him from getting any pictures or at least any more than he formerly had. Having the pictures, the major defendants can continue with their clearance over subsequent runs and maintain the same pattern of protection and price control as was created by the conspiracy. (Government's brief, p. 68)

This charge unjustifiably assumes first that the producer-exhibitors will necessarily outbid the independent and secondly, that if a producer-exhibitor licenses pictures from other producer-exhibitors there will be continued the restraint found by the lower court.

As to the first asumption, the defendant Loew's is prepared to offer competent proof that this has not happened and is not likely to happen. As to the second assumption, the Government ignores completely the rigid injunctions imposed by the District Court against unreasonable clearances, admission price-fixing the use of formula deals, franchises and master agreements.

7.

"The competitive bidding system is unworkable." (Government's brief, p. 69)

Again, at the appropriate time Loew's is prepared to demonstrate *with proof* that competitive bidding *is working and is workable.* If the detailed procedure outlined by the District Court requires amendment or modification, the necessary adjustments can be made by the District Court on proof born of experience.

Moreover, if there is question about the workability of competitive bidding, that could readily be eliminated by continuing the arbitration system and by adapting it to settling disputes with respect to competitive bidding. The five major defendants have consented to the maintenance of the arbitration tribunals of which the District Court said: "These tribunals have dealt with trade disputes, particularly those as to clearances and runs, with rare efficiency, as both Government counsel and counsel for other parties have conceded." (District Court Memorandum in re Findings and Decree R. 3702). We submit that it was within the power of the District Court to continue the arbitration system and to amplify its jurisdiction at least insofar as those five defendants are concerned. (See Point IX of this brief p. 142)

D. Any Violation of the Sherman Act with respect to Theatre Operation has been Eliminated by the Judgment.

Certain of the District Court's findings of fact or parts thereof and certain of its conclusions of law set forth illegalities found against Fox, Loew's, Paramount, RKO and Warner, exclusively *as exhibitors* or *theatre operators.* This point D is directed to demonstrating how those illegalities have been eliminated either by the direct injunction of the judgment or by future prohibition of the distribution practices.

(1) "Pooling" agreements have been eliminated by the judgment.

The first of these illegalities had to do with "pooling" agreements and profit-sharing leases. Both types of these arrangements were exclusively local. By "pooling" agreements, theatres of two or more exhibitors, normally in competition with each other, were jointly operated and their profits pooled and divided according to pre-agreed percentages. Profit-sharing leases, according to the District Court, accomplished the same results (Finds. 112-114; R. 3682). Both were found to violate the Sherman Act and have been henceforth prohibited (Concl. 9 (a); R. 3693; Judgment, III (2) and (3); R. 3698-9).

On December 31, 1946, when the judgment of the District Court was entered the defendant Loew's was not a party to any profit-sharing lease either with another defendant or with an independent. At the time it was a party to a pooling agreement in only two places in the United States. One was Pittsburgh, Pa., involving four

theatres, and the other was Astoria, Long Island, involving five theatres.[1] (Gov't Exhs. 213, 220)

The pooling agreements in the two localities mentioned have now been dissolved and terminated in accordance with the requirement of the judgment, from which Loew's has not appealed.

(2) "Joint Ownerships" have been eliminated by the judgment.

A second form of theatre operation which the District Court has found illegal is the so-called "joint ownership" of theatres by two or more theatre operators, either affiliated or independent. With respect to this situation, the District Court found (R. 3682-3):

> "115. Many theatres, or the corporations owning them, are held jointly by one or more of the exhibitor-defendants, together with another exhibitor-defendant, in some cases in conjunction with independents. These joint interests enable the major defendants to operate theatres collectively, rather than competitively. When a defendant or an independent owns an interest of five per cent or less, such an interest is *de minimis* and only to be treated as an inconsequential investment in exhibition.

[1]The Government sets forth in the appendix to its brief at pages 208 to 255 the theatre interests of the producer-exhibitors and labels certain of them, "pools". We see no reason at this time to point out the inaccuracies of the Government in labeling certain theatre interests of Loew's as pools which under the District Court's clear cut definition are not, in fact, pools. Nor is there any need, at this time, to specify the erroneous designations at page 160, *et seq.* of the Government's appendix of certain agreements as "theatre operating agreements", most of which, as to Loew's, are not, in fact, operating agreements at all, but merely ordinary non-profit sharing leases.

116. When theatres are jointly owned by a major defendant and another party, it is evident that both joint owners wish to participate and indeed are directly or indirectly participating in the business of exhibiting motion pictures. The major defendant thereby eliminates putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres independently."

A brief examination of the District Court's finding of fact No. 117 (R. 3683) will disclose that Loew's is a participant only to a very minor degree in "joint ownerships". The judgment directs that such relationships "shall be terminated within two years"[1] (R. 3699). The defendant

[1]The Government argues at pages 115 to 119 of its brief that the District Court erred in providing that a producer-exhibitor's joint interest with an independent may be dissolved either by a sale to the independent or a third party or by purchase from the independent and, if in the latter case, only after a showing to the satisfaction of the court that such acquisition will not unduly restrain competition in the exhibition of motion pictures. The Government argues that under *United States* v. *Crescent*, 323 U. S. 173 the defendants must be compelled to sell in every case because "only by such a sale may the defendants be deprived of the fruits of their unlawful conduct." The fallacy of this argument is supplied by the Government itself at page 116: "The Court made no inquiry into the precise circumstances under which any particular interest had been acquired * * *". Thus so far as this record is concerned every joint interest between Loew's and an independent should be assumed to have occurred in a perfectly lawful manner. The example referred to by the Government on page 116 of its brief: "For example, Loew's did not license its films for a first-run moreover to independent theatres in Atlanta, Georgia, and Providence, Rhode Island, until it had acquired a 50% interest in them (R. 578-579)", is no evidence whatever concerning the legality or illegality of the interest there involved. The only manner in which the legality of any joint interest can be determined is by competent evidence which could be supplied at the time when application may be made to the court for the

Loew's has joint ownerships with defendants in only two places in the United States: Buffalo, N. Y., and Denver, Colorado. As to these joint ownerships with defendants Loew's presses no appeal. On the other hand, the defendant Loew's challenges the District Court's decision with regard to joint ownerships between a defendant and an independent, and it appeals from that part of the findings, conclusions and judgment below which hold such relations *per se* illegal. Its appeal in that regard is presented in Point VI of this brief (pp. 135-138).

(3) All trade practices wherein the defendants have been found to violate the Sherman Act as exhibitors have been eliminated by the prohibition against such practices on the part of distributors.

The trade practices wherein the defendants were found to have violated the Sherman Act, *qua* exhibitors, are the same trade practices wherein the eight defendants are held to have violated the Sherman Act, as distributors. Thus, Conclusion of Law No. 9 (R. 3693) holds:

> "The exhibitor-defendants, * * * have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures both before and after the entry of said consent decree, in violation of the Sherman Act by:
>
> * * *
>
> (c) Conspiring with each other and with the distributor-defendants to fix substantially uniform

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purchase of the interest of the independent as provided in the decree. The requirement in the judgment for prior court approval is complete assurance that no illegality can result from the acquisition from an independent of any joint interest by any defendant.

minimum motion pictures theatre admission prices, runs, and clearances;

(d) Conspiring with the distributor-defendants to discriminate against independent competitors in fixing minimum admission price, run, clearance and other license terms."

We have heretofore shown how the District Court has eliminated all illegalities with respect to admission prices, clearance and run, by specific injunction against the distributors (Judgment, II; R. 3695). Since the eight distributor-defendants are thus prohibited from engaging in these trade practices, it naturally follows that it is impossible for the exhibitor-defendants to do so.

ARGUMENT AS APPELLANT ON APPEAL NO. 80

Point IV.

THE DISTRICT COURT ERRED IN FINDING AND CONCLUDING THAT LOEW'S AND THE OTHER DEFENDANTS COMBINED AND CONSPIRED *TO RESTRAIN TRADE* IN DISTRIBUTION AND EXHIBITION OF MOTION PICTURES.

The defendant-appellant Loew's assignments of errors, Nos. 3-13, 15-18, 20-24, 32, 36 and 37 (R. 3728-3736), challenge the findings, conclusions and portions of the judgment dealing with the District Court's decision that the eight defendants by certain trade practices conspired and combined *to restrain trade* in the distribution and exhibition of motion pictures.

The District Court's findings of the existence of combination and conspiracy *to restrain trade* are not predicated upon any *specific agreement* among either the eight or the five defendants. The record is utterly barren of any such proof. Indeed, there is specific testimony to the contrary on the part of each defendant (R. 535, 1843, 1849, 1110, 685, 1725, 1512). The findings of combination and conspiracy *to restrain trade* rest entirely upon *inferences,* inferences which in turn rest solely on trade practices.

We must emphasize that there is in the case at bar no evidence that any of the defendants, individually or in combination, committed any predatory act against an independent. Indeed, *the plaintiff did not offer the testimony of one single exhibitor that he had been injured by any activity of the defendants.* The entire case of combination and conspiracy *to restrain trade* rests upon the licensing

practices such as minimum admission prices in license contracts, clearances, runs, and methods of licensing, i.e. formula deals, master agreements and franchises.

It is Loew's position that none of these licensing practices or the conditions flowing therefrom warrant the drawing of an *inference* that the defendants have combined and conspired. Its argument with respect to each of these trade practices is briefly summarized below:

Minimum Admission Prices

The District Court drew the inference that the defendant distributors had combined and conspired with respect to admission prices from what it termed *uniformity of action* among the distributors. "Such uniformity of action spells a deliberately unlawful system," according to the District Court (Opinion, R. 3524).

In considering the question of admission prices it should be made clear at the outset that there is absolutely no proof of uniformity in theatre admission prices as between competing theatres. *The uniformity exists only in the case of a single theatre.* It occurs in the separate contracts made between a theatre operator and the various defendant-distributors who license their features for exhibition in that theatre. In each of these contracts there is set forth a minimum admission price which the theatre operator agrees to charge during the exhibition of the feature licensed (Find. 62; R. 3670). The court found, "There exists great similarity, and in many cases identity, in the minimum prices fixed *for the same theatres* in the licenses of all of the defendants" (Find. 66; R. 3671). However, there is not one particle of evidence that this similarity, identity or uni-

formity in the minimum admission price contained in the contracts of the various distributors licensing the same theatre is the result of agreement *between the distributors.*

In that regard, the case at bar differs decisively from the conventional price-fixing cases, such as *United States* v. *Trenton Potteries,* 273 U. S. 392, *United States* v. *Masonite Corporation,* 316 U. S. 265, or *Interstate Circuit* v. *U. S.,* 306 U. S. 208. Here, the alleged price-fixing combination is predicated solely on an inference drawn from the fact of uniformity itself. But that uniformity occurs solely because the theatre operator, as a matter of good showmanship, continues a constant admission price from day to day no matter whose feature is being exhibited, and from the fact that it is he, the theatre operator, who sets the minimum admission price which he will charge and which appears in his license agreements with the various distributors. The District Court itself found (R. 3670):

> "63. The minimum admission prices included in licenses of each of the eight distributor-defendants for any given theatre are in general uniform, *being the usual admission prices currently charged by the exhibitor.*"

This uniformity in the case at bar, therefore, does not establish the existence of a price-fixing system set up by the concerted action of the distributors. At most, it is evidence of exhibitors themselves catering to their steady customers to whom frequent changes in admission prices of a theatre are irritating and annoying.

While all distributors licensing a given theatre obviously know the admission price "currently charged by the exhibitor", it is the latter alone who, by the constancy of the price which he charges for admission to his theatre, is

responsible for the uniformity in the minimum prices specified in his separate contracts with the respective distributors. Indeed, it is difficult to conceive how dissimilarity could be injected into the admission prices at which the various distributors' pictures are exhibited to the public *without a distributor* actually interfering with and *determining the admission price* policy of the exhibitor against his will.

In the past the only contractual deterrent to an exhibitor's changing the admission price of his theatre at relatively short intervals was the long term license agreement, i.e. the franchise or the former practice of licensing a season's product under a single agreement. It might be argued that a provision with respect to minimum admission prices when included in these methods of licensing introduced immutability in a single theatre's admission prices and in turn created, as to a larger number of theatres, what amounted to a fixed system of admission prices, as the District Court found (Find. 64; R. 3670-1). The facts are, however, that since the time of the consent decree in 1940 Loew's had made absolutely no franchises and has followed a practice of licensing pictures in small blocks (generally not more than five), (R. 426-427, 552; Find. 94; R. 3676). And the same is true as to the other four consenting defendants (Find. 94; R. 3676). Furthermore, at the time of the trial Loew's had outstanding no franchise agreements for any theatre in which it did not have an interest (Find. 90, R. 3675). It is entirely clear, therefore, that for the five years preceding the hearings in the lower court all exhibitors to whom Loew's licensed its pictures were entirely free to alter their admission prices at relatively short intervals as they saw fit.

Since we have demonstrated the reasons why uniformity has occurred in the minimum admission prices contained in the respective license agreements of the distributors licensing a given theatre and since Government's counsel offered no proof whatsoever to challenge these lawful business reasons, we submit that the District Court's inference or presumption, which rests solely on uniformity, was improperly drawn as a matter of law.

> "Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear, presumptions disappear." *Lincoln* v. *French*, 105 U. S. 614, 617.

See also, *Pennsylvania Railroad Co.* v. *Chamberlain, Administratrix*, 288 U. S. 333, 340-341; *Fresh* v. *Gilson, et al.*, 41 U. S. 327, 331.

It was only upon the basis of this *combination* or *conspiracy* improperly inferred from uniformity, that the District Court henceforth enjoined the inclusion in license contracts of any provision with respect to minimum admission price (Judgment, II, 1; R. 3695; see Opinion, R. 3520-4). That injunction, we submit, is wholly unwarranted not only because the inference of combination and conspiracy was error, but because it is rendered unnecessary by the requirement of the judgment that henceforth all the defendant distributors must license on a picture by picture basis (Judgment, II, 1; R. 3695), a provision of the judgment to which the defendant Loew's has not assigned error.

This picture by picture licensing, unrestricted by long term agreements, will eliminate any possibility of a fixed system of prices from which the exhibitor cannot deviate.

Henceforth the inclusion of a minimum admission price in this form of license agreement will not be a fixing of the admission prices in any sense by the distributor. Its only effect will be to assure the distributor (particularly in the case of licenses based upon a percentage of the gross) of the film revenue under the license which was negotiated and granted on the basis of the admission price which the exhibitor determined to charge during the exhibition of the particular feature in question, a contractual protection to which the distributor is clearly entitled under the provisions of the Copyright Law, 17 U. S. C. Section 1; Appendix I, hereto. (As to this right of the distributor to insert a minimum admission price in a license agreement see Point VIII of this brief at pages 119-120.)

Clearance

The District Court held that "the distributor-defendants have acted in concert in the formation of a uniform system of clearances for the theatres to which they license their films and that the exhibitor-defendants have assisted in creating and have acquiesced in this system." (Opinion R. 3584) Findings and conclusions of law that the defendant-distributors have combined and conspired with respect to clearance were likewise made (Finds. 79-82 and 84; Concls. 7(b), 8(c) and 9(c); R. 3674, 3692-3). To these findings and conclusions the defendant Loew's has assigned error (Nos. 15-18 and 20-24; R. 3743-3745).

As in the case of minimum admission prices, the lower court's decision that the defendants have combined and conspired with respect to clearance rests solely upon *infer-*

ence. This inference is drawn from the uniformity of the periods of clearance granted to a given theatre by the distributors licensing that theatre, and from the fact that the period of clearance for each such theatre remains constant for relatively long periods of time.

Here as in the case of admission prices there is a lawful business explanation of this uniformity and constancy, sufficient to rebut any inference of conspiracy.

The reason for uniformity as to clearance is, however, not the same as in the case of minimum admission prices. In the latter case it was due to the inclusion in an exhibitor's license agreements with his respective distributors of "the usual admission prices currently charged by the exhibitor" (Find. 63; R. 3670); in other words, the uniformity was due to the exhibitor's fixing a price for admission to his theatre and continuing that price no matter whose picture was exhibited.

Clearance, on the other hand, is not fixed by the exhibitor alone. It is determined as a result of negotiation between the prior-run operator and the distributor licensing him a feature. The theatre operator obviously seeks to obtain the maximum period over the competing subsequent runs. The distributor on his part, however, contemplates licensing his picture to other operators and for that reason negotiates with the prior-run the proper period that should elapse before the picture is again shown in that competitive area. That period is controlled by such factors as size, location, transit facilities, etc. relative to the theatres involved (Opinion, R. 3533-4). Those factors are the criteria of clearance no matter whose pictures are involved. Consequently whatever period is proper as to one distributor is proper as to others.

There are additional perfectly lawful reasons which also make for uniformity as to clearance. One of the important aspects in the operation of a theatre is the "booking" of pictures licensed. In booking his theatre, a subsequent run exhibitor finds it most difficult, if not impossible, to book his theatre if he is subject to varying clearances from different distributors. In the case of a subsequent run exhibitor playing double features and changing his program two or three times a week, there is involved the booking of two or three hundred pictures a year. Thus it is the exhibitor who insists upon being subject to the same clearance from all distributors from whom he licenses pictures so that his booking problem will be facilitated (R. 714). In the case of prior-run exhibitors, there is also an insistence upon the part of such exhibitor to obtain from every distributor the longest period of clearance which he has been able to negotiate from any of them (R. 711). It is thus clear that uniformity in clearance as to a particular theatre is not the result of any agreement or concerted action among distributors, but on the contrary, it is only the result of these practical considerations inherent in the business which impel *exhibitors and not distributors* to seek uniform clearances.

Cogent proof that these are the reasons for uniformity of clearance and not any conspiracy or combination among distributors, is found in the fact that of the hundreds of cases as to clearance tried and determined by the Arbitrators and the Appeal Board under the Arbitration System established by the consent decree, not one decision specifies a different clearance as applying to different distributors.

The action of the arbitrators and Appeal Board in making the same findings of clearance with respect to each of the consenting defendants is of particular significance.

Sitting as independent outside arbiters, over a period of years, and making their determinations only after listening to the witnesses and receiving detailed evidence underlying each situation, they have come to the conclusion in each instance that the same clearance should apply to each distributor.

Similarly the fact that clearance between two theatres remains constant over relatively long periods of time offers no basis for inferring combination or conspiracy among distributors. Because the factors or criteria determining clearance, such as size, location, transit facilities, etc., relative to the theatres in question, by their very nature usually remain constant, it is to be expected that the period of clearance once determined will not change. In this connection it should be noted that there has not been a single case since the inception of the Arbitration System under the consent decree in 1940 where an exhibitor because of changed conditions sought a modification of an award fixing the maximum clearance. This opportunity for modification of an award based upon change in conditions was afforded every exhibitor by section VIII of the consent decree (R. 3379-81).

The lower court placed reliance on the long term license agreements, i.e. franchises as well as the license agreements covering one season, as tending to impart permanency to periods of clearance (Opinion, R. 3537-8). However, in this connection it is again important to note that commencing with the consent decree in 1940, five years prior to the hearings in this case, the five major defendants discontinued granting either franchises or license agreements covering even one season (Consent Decree, IV; R. 3375). Since the consent decree Loew's practice has been to license pictures in relatively small blocks or individually as to special features (Find. 94; R. 3576; R. 552).

Further disproving any combination or conspiracy among the distributors as to clearance is the undertaking, embodied in the consent decree, by the five consenting defendants to permit the arbitration of the reasonableness of any clearance. Prior to the consent decree a distributor had entire discretion in the granting of clearance. The surrender of this prerogative in 1940 by the five consenting distributors is fundamentally inconsistent with a finding that Loew's was engaging in a conspiracy with these other four defendants to forward a uniform system of clearances.

Upon the foregoing we submit that the District Court erred in its findings and conclusions that Loew's together with the other defendants combined and conspired with respect to clearance.

Run

The District Court found that "The defendants have acted in concert in their grant of run" and that "Both independent distributors and exhibitors, when attempting to bargain with the defendants have been met by a fixed scale of clearance, *runs*, and admission prices to which they have been obliged to conform, if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with the defendant's theatre or theatres to which the latter had licensed their pictures." (Finds. 82, 84; R. 3674). Corresponding conclusions of law that the defendants had combined and conspired with respect to *run* were made (Concls. 7(b), 8(c) and 9(c) and (d); R. 3691-3693). The appellant Loew's has assigned error to these findings and conclusions (Nos. 17, 20-22; R. 3732-3733).

Whether or not Loew's has combined and conspired with the other defendants to create a fixed system of runs

can only be determined by examining its activities as a distributor and as an exhibitor in the licensing of runs.

The defendant Loew's offered detailed, specific proof with respect to its activities as a distributor (R. 450-499), and this proof established that in licensing its product, Loew's was guided solely by the merits of the theatres involved and by the maximum revenue it could obtain from the theatres licensed. The witness Rodgers, who was the official responsible for setting the sales policy in connection with the licensing of Metro-Goldwyn-Mayer pictures testified that the theatres which received these pictures first-run in the 92 largest cities in the country, were the ones from which he anticipated greatest revenue (R. 476, 574). The Government offered not one jot of proof in rebuttal. We submit that the uncontradicted testimony in this regard rebuts any inference of conspiracy in the granting of run.

The Government's statistical presentation indicating that in the majority of the 92 largest cities Metro pictures are licensed first-run for exhibition in affiliated theatres is of no significance whatsoever to prove that these theatres were licensed pursuant to a conspiracy. In the first place, 36 of the 92 cities are accounted for by reason of the fact that Loew's operates its own first-run theatres there (Find. 149, R. 3689). As to the remaining cities, where Loew's has no theatres, Government counsel offered no proof whatsoever that any independent operator was entitled on the merits of the situation to the run that Loew's licensed to another producer-exhibitor. On the contrary, there is affirmative proof that the affiliated theatres so licensed by Loew's were better than or at least as good as any of the independent theatres (R. 450-499).

With respect to Loew's activities as an exhibitor, the District Court made specific factual findings which disprove any combination or conspiracy on its part with respect to the licensing of run. These findings, Nos. 131 to 135 (R. 3686-3687), show that the other four producer-exhibitor defendants licensed first-run of their respective pictures to Loew's competitors (including independents) to a far greater extent than to Loew's. As heretofore pointed out Loew's operates theatres in 36 of the 92 cities with over 100,000 population. In 21 of those 36 cities during the 1943-1944 season, every one of the other four producer-exhibitors regularly licensed their product first-run not to Loew's theatres, but to other theatres in direct competition with Loew's (Find. 131; R. 3686). These findings also establish that over the ten year period from 1935 to 1945, there was a decrease in the number of features licensed by the other four theatre-owning distributors to Loew's first-run theatres; and a corresponding increase in the use by Loew's theatres of the features of the non-theatre-owning distributors (Finds. 132, 133; R. 3686).

As to the District Court's finding of a *fixed* condition of runs, the same lawful business explanation applies as in the case of clearance. The factors which constitute the criteria for the selection of a given theatre as a first-run theatre do not change from day to day or from year to year. Thus, the factors which make the Radio City Music Hall in New York City the choice as a first-run theatre have not changed over the fifteen year period of its operation.

In view of the utter lack of proof as to any combination or conspiracy with respect to run and in view of the affirmative proof to the contrary offered by the defendant Loew's and other defendants it is respectfully submitted that the

District Court erred in its finding and conclusion of combination and conspiracy.

Formula Deals, Master Agreements and Franchises.

The lower court made the following conclusion of law with respect to formula deals, master agreements and franchises:

> "The formula deals, master agreements and franchises referred to in Findings 86, 88 and 89 have tended to restrain trade and violate Section 1 of the Sherman Act." (Concl. 10; R. 3693)

The defendant Loew's has not assigned error to the findings referred to or to this conclusion of law or to the portions of the judgment prohibiting the future use of formula deals, master agreements (blanket deals) or franchises, for the reason that these trade practices have played a relatively small part in the distribution of Metro pictures. On the other hand, *to the extent that the court may have inferred from these licensing practices a combination or conspiracy* among the producer-exhibitor defendants to create a fixed system of runs, clearances and admission prices, the defendant Loew's urges its assignments of errors to the findings of fact and conclusions of law in that regard (Nos. 3-13, 15-18, 20-24, 32, 36 and 37; R. 3728-3736).

An analysis of *the evidence* relating to Loew's use of franchises, master agreements and formula deals, both as a distributor and as an exhibitor is absurdly insufficient to establish any conspiracy or combination by Loew's with the other producer-exhibitor defendants and equally demon-

strates the insignificant use of these distribution practices in Loew's business.

As to formula deals the court found "Loew's is not and never has been a party, either as a distributor or as an exhibitor, to any 'formula deal' license agreements" (Find. 87; R. 3675).

With respect to franchises granted to Loew's theatres by other producer-exhibitors the evidence shows that Loew's theatres were *never* granted any franchise by RKO or Warner, only *one* franchise by Fox covering only *one* first-run situation in *one* city in the United States and only two franchises by Paramount, both of which expired over ten years ago (Gov't. Exh. 396).

With respect to franchises granted by Loew's as a distributor the undisputed facts are as follows. The consent decree in 1940 prohibited the future granting of franchises by requiring the licensing of features in blocks of no more than five pictures and the court found that "Loew's today has outstanding no franchise agreements for any theatre in which it does not have an interest and Loew's is not currently granting franchises * * *" (Find. No. 90; R. 3675).

Throughout its entire history Loew's as a distributor granted independent theatre operators more than twice as many franchises as it granted to the producer-exhibitor defendants (Find. 90; R. 3675). This proof completely defeats any inference of conspiracy or combination that might be drawn from the relatively small number of franchises granted to producer-exhibitor defendants (Find. 90; R. 3675).

So far as master agreements (blanket deals covering not more than a season's product, as distinguished from

franchises covering a longer period) with other producer-exhibitors are concerned there is evidence of only *one* such agreement between Loew's as an exhibitor and another producer-exhibitor defendant (Gov't. Exh. 243). So far as Loew's use of master agreements *as a distributor* is concerned there is in evidence only *one* exhibit showing Loew's licensing on a master deal basis. This exhibit, (Gov't. Exh. 250), consists of eleven exhibition contracts covering in all the licensing of thirty-three pictures to a subsidiary of Paramount for exhibition in subsequent-run theatres all located in one city.

There is no evidence showing that Loew's either as a distributor or as an exhibitor made any master agreements whatsoever with RKO, Fox or Warner.

In considering these trade practices and the conditions flowing therefrom, we emphasize again how very tenuous and innocuous is the proof upon which the "combination and conspiracy" in the case at bar rest. We submit that the District Court erred in finding that Loew's combined and conspired in any respect to restrain trade in exhibition and distribution.

Point V.

THE DISTRICT COURT ERRED IN IMPOSING A PROHIBITION UPON LOEW'S EXPANDING ITS THEATRE HOLDINGS.

(On Loew's Appeal No. 80)

A. *Loew's Exemplary Record* in the Exhibition Field Warrants Particular Consideration.

Section III, Paragraph (6) of the judgment provides (R. 3698, 3700):

> "Each of the defendant exhibitors * * * is hereby enjoined and restrained:
>
> * * *
>
> (6) From expanding its present theatre holdings in any manner whatsoever except as permitted in the preceding paragraph."

The "preceding paragraph" enjoins the defendants from continuing to own any beneficial interest in a theatre in conjunction with another defendant or an independent. To terminate such a *joint* interest, the preceding paragraph permits a defendant to acquire the interest of the other defendant or of the independent, providing it is shown to the satisfaction of the Court, and "the Court shall first find that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures" (R. 3699).

After the entry of the judgment, the defendant Loew's and others moved in the District Court to amend Paragraph (6) of Section III of the judgment, which imposes the absolute prohibition on expansion, so as to read as follows (R. 3704):

"From expanding its present theatre holdings in any manner whatsoever, except as permitted in the preceding paragraph; or *except for the purpose of acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field, if such defendant shall show to the satisfaction of the Court, and the Court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures.* Reasonable notice of the intention to make any such acquisition shall be served upon the Attorney General and the plaintiff shall be given an opportunity to be heard with respect thereto before any such acquisition shall be approved by the Court."

This motion was denied without opinion (R. 3720).

Loew's assigned error to Section III, Paragraph (6) of the judgment as well as to the denial of the motion just mentioned (Assignments Nos. 30 and 31; R. 3735).

Loew's history as an operator of theatres presents an outstanding record of healthy anti-monopolistic development which there is no justification or reason for arresting.

These are the facts:

1) Loew's has no "closed town" and no first-run monopoly (Appendices II and III; Exh. L-15).

2) Loew's has competition from first-run theatres as well as subsequent-run theatres in every place where it operates (Appendices II and III; Exh. L-15).

3) There is independent first-run competition in 21 of the 36 cities with over 100,000 population where Loew's operates; and in the remaining 56 cities of over 100,000 population, Loew's operates no theatres whatsoever (Find. 149; R. 3689).

4) Loew's operates only 131 theatres, which constitute but 7/1000 of the total theatres operating in the United States (Exh. L-12; cf. Find. 118; R. 3684).

5) Loew's theatres are located in a total of 42 cities across the United States (Appendices II and III).

6) There has been an increase of only 9 theatres in the thirteen year period from 1932 to the date of the hearings below (Exh. L-12).

7) There has been no engrossing of the film supply by Loew's theatres (Finds. 131, 134; R. 3686).

8) There has been a consistent favoring by Loew's theatres of the product of non-theatre owning distributors over that of the other four producer-exhibitors (Finds. 132-133; R. 3684).

9) There is no evidence of Loew's buying out any competing exhibitor or of any competitor even going out of business or of any predatory practice whatsoever on the part of Loew's.

10) There is no evidence that any Loew's theatre was acquired in any other than a normal, lawful manner or that any such acquisition restrained competition in any manner.

This record, we submit, is so outstanding as to merit particular consideration being given to the defendant Loew's.

B. The Judgment Should Be Modified to Permit Loew's to Acquire Additional Theatres with Court Approval.

The District Court having recognized the fundamental right of those engaged in the production of motion pictures to operate theatres (Opinion, R. 3554), and having further found that Loew's did not have a monopoly of exhibition either individually or collectively (Find. 119; R. 3684), and that the illegalities here were in trade practices and not in theatre ownership (Find. 154; R. 3690), it defies the imagination to supply an explanation for the court's *legislative* action terminating all future growth or theatre operation by Loew's. Admitting, *arguendo*, every finding, every conclusion of law and every condemnatory statement of the opinion, there still is no support whatsoever in the record, or otherwise, for this arbitrary termination of development which has been the keystone of American industry and which in the case of Loew's has certainly never been abused.

The trade practices which the District Court found illegal consist of "admission price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals," etc. (Find. 154; R. 3690), and the court has now taken drastic action effectively designed to eliminate these trade practices. Loew's has taken no appeal from the prohibition against formula deals, master agreements and franchises (Judgment II, 5 and 6; R. 3696). Nor has it appealed from those provisions of the judgment requiring theatre by theatre and picture by picture licensing, or from the injunction against arbitrarily refusing the demand of an exhibitor for a run and the provision for competitive bidding (Judgment II, 8 and 9; R. 3696-7).

With these rigid controls in effect, it will be altogether impossible in the future operation of any theatre that Loew's *might hereafter acquire* to impair in any manner the competitive opportunities of independents owning theatres presently in existence or of independents who would build or acquire theatres in the future. With the additional requirement that any acquisition be subject to court approval, any law violation in connection with the acquisition itself is inconceivable.

Without permissive growth Loew's with the comparatively small number of theatres which it operates across the United States, to wit, 131, is faced with a static existence which is the very antithesis of the development that competition is designed to promote.

The present provision against normal growth, which prohibits Loew's from building or acquiring a theatre in a "closed town" of another exhibitor (independent or affiliated), or in a city where another exhibitor has a first-run monopoly, is fundamentally at variance with the underlying principle of the Sherman Act.

Moreover, in a locality where Loew's as a distributor is unable to obtain exhibition of its pictures by reason of the monopoly power exercised by the exhibitor operating in such locality, Loew's should be free, with court approval, to obtain or establish exhibition facilities of its own. This would not only afford Loew's an outlet for its product in that locality, but would make it possible for the public there to see Loew's pictures.

Finally, under the present prohibition, it will be altogether impossible for Loew's to meet changing economic trends and developments, such as shifts in population, major changes in transit facilities, etc., which are inevitable over the years.

It is thus clear that there is neither justification nor need for the *absolute arrest of Loew's further theatre development* now prescribed by the judgment.

The injunction, therefore, is wholly punitive. And its punitive character is particularly evident in the case of Loew's, where throughout its history its growth has been in only the most moderate manner. Even in *U. S. v. Crescent Amusement Co.*, 323 U. S. 173, 186, where, unlike the case at bar, predatory practices were found, this Court held:

> "Where the proclivity for unlawful activity has been as manifest as is here, the Decree should operate as an effective deterrent to the repetition of the unlawful conduct and *yet not stand as a barrier to healthy growth on a competitive basis.*"

In its opinion in the case at bar the District Court recognized the principle enunciated in the *Crescent* opinion when it said (R. 3562):

> "Each of the defendants shall be enjoined from expanding its theatre holdings except for the purpose of acquiring a co-owner's interest in jointly owned theatres, and this only in cases where the Court shall permit such acquisition, instead of requiring an outright sale of the undivided interest of the defendant in question. The foregoing provision as to divestiture of partial interest in theatres shall apply both to interests held in fee and beneficially and to those represented by shares of stock. *But it shall not prevent a defendant from acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field; if in the latter case, this Court or other competent authority shall approve the acquisition after due application is made therefor.*"

This written expression of opinion was carried over to the oral argument with respect to the proposed judgment. At R. 3057-58, the following exchange took place between counsel and the Court:

> "Mr. Seymour: Now I will pass on, if I may to section 5 at the top of page 5. That is the injunctive provision dealing with future acquisitions. We have tried in our language to follow the Court's opinion. Mr. Wright has suggested an absolute ban on any future acquisitions. He says 'from expanding its present theatre holdings in any manner whatsoever.' Now, that is directly in the teeth of your Honor's opinion.
>
> Judge Hand: We are not going to have any such drastic provision as that. We considered that."

From the time the lower court rendered its opinion and from the time of the argument at which this colloquy took place to the date of the entry of the judgment, there was no additional evidence or even argument on this point to afford a basis for the change in the court's position.

We respectfully submit that the District Court was in error when it imposed against Loew's the absolute prohibition upon growth or development of theatre operation and that the judgment should be modified to provide for expansion subject to court approval.

Point VI.

THE DISTRICT COURT ERRED IN ENJOINING LOEW'S FROM OWNING ANY BENEFICIAL INTEREST IN A THEATRE WITH AN INDEPENDENT.

(On Loew's Appeal No. 803)

On this phase of the appeal, Loew's is not attacking that part of the District Court's judgment which prohibits Loew's from owning any beneficial interest in a theatre with a co-defendant. Its attack is directed exclusively upon the provision of the judgment whereby the defendants are directed to terminate all joint ownerships with an independent.

The judgment provides (Section III, R. 3698-9):

> "Each of the defendant exhibitors * * * is hereby enjoined and restrained:
>
> (5) From continuing to own or acquiring any beneficial interest in any theatre, whether in fee or shares of stock or otherwise, in conjunction with * * * an independent [meaning any former, present or putative motion picture theatre operator which is not owned or controlled by the defendant holding the interest in question,] where such interest shall be greater than five per cent unless such interest shall be ninety-five per cent or more. The existing relationships which violate this provision shall be terminated within two years."

The judgment further provides that the relationships between the defendants and independents shall be terminated by a sale to, or purchase from the co-owner or co-owners, or by a sale to a party not one of the other defend-

ants (R. 3699). In the event a defendant desires to acquire the interest of the independent it must be shown to the satisfaction of the court, and the court must first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures (R. 3699).

This portion of the judgment requiring termination of joint interests with independents as well as defendants, was based on the following findings of the District Court (R. 3682-3):

> "115. Many theatres, or the corporations owning them, are held jointly by one or more of the exhibitor-defendants, * * *, in some cases in conjunction with the independents. These joint interests enable the major defendants to operate theatres collectively, rather than competitively. When a defendant or an independent owns an interest of five per cent or less, such an interest is *de minimis* and only to be treated as inconsequential investment in exhibition.
>
> 116. When theatres are jointly owned by a major defendant and another party, it is evident that both joint owners wish to participate and indeed are directly or indirectly participating in the business of exhibiting motion pictures. The major defendant thereby eliminates putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres, independently." (R. 3682-3).

With regard to these joint ownerships, the Court made the following conclusions of law (R. 3693):

> "9. The exhibitor-defendants, * * * have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures both

before and after the entry of said consent decree, in violation of the Sherman Act by:

* * *

(b) Jointly owning motion picture theatres * * * with independents through stock interests in theatre buildings;"

The appellant Loew's assigned error to these findings, this conclusion of law and to the portion of the judgment which compels dissolution of these joint interests with independents (Nos. 25 and 26; R. 3733-4).

If these findings Nos. 115 and 116 cannot stand for lack of proof, the conclusion of law and injunction based thereon obviously must fall. Not only is there no proof whatever in this record to sustain these findings, but there was not even a scintilla of evidence tendered by either party with respect thereto. The Government on its part did not urge either in its pleadings, at the hearings or in argument the illegality of joint stock interests, and the defendants, having no knowledge that they were obliged to meet any such charge, were deprived of the opportunity to present facts to meet this phantom issue.

Consequently, the record is barren of *any* proof whatsoever as to how these joint ownerships with an independent came about.

It is wholly consistent with anything that appears in the record, that a defendant's joint interest in a theatre might be with an important employee who never had either the capital, the desire or the intent to operate independently in competition with the defendant, but who acquired his joint interest as a reward for prior years' services and as an incentive to future endeavor. Furthermore, for all that appears in this record, a defendant's joint interest in a theatre might be with a former operator who went out of

the exhibition business not because of any law violation by the defendant, but rather solely by reason of his retirement from business on account of ill health. *If an opportunity were afforded to the defendants to present facts on this issue,* any number of perfectly lawful explanations could be given as to the manner in which these joint interests with independents came about.

Thus, the record is devoid of any basis for the court's gratuitous assumption in finding No. 116 that "both joint owners wish to participate * * * in the business of exhibiting motion pictures." Furthermore, the record is also lacking in proof that anyone such as a former operator who retired on account of ill health but retained his half-interest is "directly or indirectly participating in the business of exhibiting motion pictures" (Find. 116; R. 3683). It is equally wrong to assume that a joint owner, such as an important employee or an operator retiring on account of ill health, "otherwise would be in a position to operate theatres, independently" (Find. 116; R. 3683).

The foregoing also demonstrates the fallacy of the court's statement in finding No. 115 that these "joint interests enable the major defendants to operate theatres collectively rather than competitively". If the joint owner were a former operator who retired because of ill health, or an important employee who was given a joint interest as described above, it defies logic to assume that this individual would be operating a theatre in competition with the defendant but for such joint interest.

We submit that every part of findings Nos. 115 and 116 are nothing but outright assumptions of facts, facts which were neither charged in the petition nor litigated at the trial. The conclusion of law and injunctive relief based on these findings must therefore be reversed.

Point VII.

THE DISTRICT COURT ERRED IN DECREEING THAT WHENEVER ANY CLEARANCE PROVISION IS ATTACKED AS NOT LEGAL UNDER THE PROVISIONS OF THIS DECREE, THE BURDEN SHALL BE UPON THE DISTRIBUTOR TO SUSTAIN THE LEGALITY THEREOF.

(On Loew's Appeal No. 80.)

Loew's assigned error (No. 19; R. 3732) to Paragraph 4 of Section II of the judgment below (R. 3695-6) decreeing that

> "Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof."

It is Loew's position that this arbitrary transfer of the burden of proof alters one of the most fundamental principles of jurisprudence, is unwarranted and is an unconstitutional deprivation of its right to due process of law. *National Labor Relations Board* v. *Whittier Mills Co., et al.*, 123 F. (2d) 725, 727 (C. C. A. 5th); *National Labor Relations Board* v. *Knoxville Pub. Co.*, 124 F. (2d) 875, 879 (C. C. A. 6th); *Reliance Life Ins. Co.* v. *Burgess*, 112 F. (2d) 234, 238 (C. C. A. 8th), cert. den., 311 U. S. 699, rehearing den., 311 U. S. 730.

Point VIII.

THE DISTRICT COURT ERRED IN ENJOINING LOEW'S FROM AGREEING WITH A LICENSEE THAT THE LATTER SHOULD CHARGE A SPECIFIED MINIMUM ADMISSION PRICE DURING THE EXHIBITION OF THE FEATURE LICENSED.

(On Loew's Appeal No. 80.)

Loew's assignment of error No. 1 (R. 3728) challenges Section II, 1 of the judgment, which enjoins each of the distributor-defendants from granting any license in which minimum prices for admission to a theatre are fixed by the parties. Loew's assignment of error No. 2 (R. 3728) challenges the District Court's failure to conclude that a distributor-defendant has a lawful right under the Copyright Act and under the common law to agree with its licensee that the latter shall charge a price not less than that specified in the license agreement during the exhibition of the feature licensed. And, finally, Loew's by its assignment of error No. 14 (R. 3731) attacks the District Court's failure to find that the Copyright Act and the common law permit a provision as to minimum admission price in the license agreement during the exhibition of a feature as a "road-show".

It is Loew's position that it is essential in the conduct of its business and that it has a fundamental right under the Copyright Act and the common law to protect the value of its copyrighted motion pictures by the insertion of minimum admission prices in license agreements with its licensees. For the detailed argument with respect to this, we respectfully refer the Court to the "Brief For RKO Defendants" at pages 58-67.

As to features exhibited on a road-show basis, it is submitted that there is an even greater need to insure the film rentals from their exhibition in order to recoup the unusually large production costs, and thus, *a fortiori*, the right to provide for minimum admission prices in license agreements covering such exhibitions should be recognized. For the detailed argument with respect to this, we again respectfully refer the Court to the "Brief for RKO Defendants" at pages 68-71.

Point IX.

THE DISTRICT COURT ERRED IN FAILING TO CONCLUDE THAT IT HAD POWER TO CONTINUE THE ARBITRATION SYSTEM CREATED BY THE CONSENT DECREE AND TO PROVIDE FOR THE ARBITRATION OF DISPUTES BETWEEN EXHIBITORS AND DEFENDANTS ARISING UNDER THE PRESENT JUDGMENT.

(On Loew's Appeal No. 80.)

The appellant Loew's by its assignments of errors Nos. 34 and 35 (R. 3736) puts in issue the legal conclusion of the District Court that it did not have power to continue the arbitration system established by the consent decree of November 20, 1940, which system it found in the past has "dealt with trade disputes particularly those as to clearance and runs, with rare efficiency, as both government and counsel for other parties have conceded" (Memorandum in re Findings and Decree; R. 3702) and as to the future would be "effective and result in quick and expeditious decisions and a saving of time and money". (Find. 160, R. 3690-1).

It is Loew's position that the District Court had power to continue the arbitration system established by its decree of November 20, 1940, and to provide for the arbitration of disputes between exhibitors and defendants arising under the present judgment. *Chrysler Corporation* v. *U. S.*, 316 U. S. 556; *United States* v. *Swift & Co.*, 286 U. S. 106; *United States* v. *Radio Corporation of America*, 46 F. Supp. 654 (D. C. Del.).

For further argument in support of this position we respectfully refer the Court to the brief for Twentieth Century-Fox Film Corporation at pages 36-42.

CONCLUSION

The findings, conclusions and judgment of the District Court to the extent that they are appealed from by the Government on Appeal No. 79 should be affirmed.

The findings, conclusions and judgment of the District Court to the extent that they are appealed from by Loew's on Appeal No. 80 should be reversed.

Respectfully submitted,

JOHN W. DAVIS
J. ROBERT RUBIN,
Attorneys for Loew's Incorporated.

S. HAZARD GILLESPIE, JR.
BENJAMIN MELNIKER,
Of Counsel

February 2, 1948.

APPENDIX I

Pertinent Provisions of the Sherman Anti-Trust Act (15 U. S. C. §§ 1, 2 and 4):

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal; * * *

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor; * * *"

"Sec. 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7, inclusive, or section 15 of this chapter; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *"

Pertinent Provisions of the Copyright Act (17 U. S. C. §§ 1 and 5):

"Sec. 1. That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

(a) To print, reprint, publish, copy and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a non-dramatic work; * * *

(d) To perform or represent the copyrighted work publicly if it be a drama or; if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever;

* * * * *

Sec. 5. That the application for registration shall specify to which the following classes the work in which copyright is claimed belongs: * * *

(l) Motion-picture photoplays;

(m) Motion pictures other than photoplays: * * *

APPENDIX II.

LOEW'S FIRST RUN THEATRES AND COMPETING FIRST-RUN THEATRES

in Cities of over 100,000 Population (36 in all)

AKRON, OHIO

Theatre[1]	Capacity[1]	Operator[1]	Affiliation[2]	Product[3]	
Colonial	1750	Fiber & Shea	Independent	(Fox	
				(RKO	⅓
Strand	1160	Warner Bros	War	War	
Palace	2083	Katz & Chatkin	Independent	(Uni	
				(Par	⅓
				(RKO	⅓
				(Col	
*Loew's**	*2986*			*Loew's*	*29*
				UA	*19*
				Par	*16*

ATLANTA, GA.

Fox	4661)			(Par	
Paramount	2475)	Lucas & Jenkins	Par	(Fox	
Roxy	2200)			(War	
Capital	2100)			(Uni	
				(RKO (except Goldwyn)	
Rialto	983	Murray	Independent	(Col	
				(Goldwyn	
				(RKO)	
Rhodes	723	Lucas & Jenkins	Loew's		
Grand	*2044*			*Loew's*	*28*
				UA	*9*

Abbreviations

Loew's Metro-Goldwyn-Mayer	Loew's
20th Cent. Fox	Fox
Paramount	Par
RKO	RKO
Warner Bros.	War
Columbia	Col
Universal	Uni
United Artists	UA

Sources

1—Exh. L-13, L-17, 48
2—Exh. 156-163, 359-360
3—Exh. L-17, 44, 58, 84, 95, 129, 145, 147, 349. (Products listed are limited to those of 8 defendants)

*Throughout this table, theatres *operated* by Loew's are set forth in italics beneath the center line ———— . In the 1943-44 season Loew's distributed a total of 33 features.

BALTIMORE, MD.

Theatre	Capacity	Operator	Affiliation	Product	
Stanley	3250	War	War	(War (Par	½
Hippodrome	2205	Rappaport	Independent	(RKO (Col	
New	1200	Mechanic	Independent	Fox	
Keiths	2400	Shanberger	Independent	(Uni (Par	½
Century	*2996*			*Loew's* *UA*	*29* *7*
Valencia	*1460*			*Loew's* *UA*	*31* *9*

BOSTON, MASS.

Metropolitan Fenway Paramount	4278) 1873) 1798)	M & P	Par	(Fox (Par (War	⅓
Keiths Memorial	2907	RKO	RKO	(Uni (RKO	
Keiths Boston	3223	RKO	RKO	(Fox	⅓
Majestic	1036	Brandt	Independent		
State	*3536*			*Loew's* *UA* *Col*	*29* *10* *20*
Orpheum	*2890*			*Loew's* *UA* *Col*	*27* *10* *18*

BRIDGEPORT, CONN.

Warner	1332	Warner Bros	War	(Par (RKO (War	½
Merritt	1000	" "	"	UA part	
Poli	*3642*			*Loew's* *UA* *Col* *Uni* *Fox* *RKO*	*20* *3* *20* *19* *20* *9*

BRIDGEPORT, CONN. (Continued)

Theatre	Capacity	Operator	Affiliation	Product	
Majestic	2252			Loew's	9
				UA	7
				Col	14
				Uni	25
				Fox	8
				RKO	8
Globe	1909			Loew's	20
				UA	4
				Col	17
				Uni	16
				Fox	22
				RKO	8
Lyric	2166			Loew's	14
				UA	11
				Col	7
				Uni	5
				Fox	9
				RKO	7

BUFFALO, N. Y.

Lafayette	2988	Basil Bros.	Independent	(Uni	
				(Col	
				(UA	
				([Part]	
Century	3042	20th Century Corp.	Independent	(RKO	
				(War	
				([Part]	
Great Lakes	3028		Loew's-Par*-Ind	Loew's	9
				Par	9
				War	3
				UA	3
				Fox	7
Hipprodrome	2091		Loew's-Par*-Ind	Loew's	16
				Par	21
				War	11
				UA	5
				Fox	16
Buffalo	3488		Loew's-Par*-Ind	Loew's	17
				Par	17
				War	10
				UA	7
				Fox	19

*The joint interest of Loew's and Paramount in these theatres must be terminated pursuant to section III(5) of the judgment (R. 3698-9).

CANTON, OHIO

Theatre	Capacity	Operator	Affiliation	Product
Palace	1892	Interstate	Independent	(Fox (RKO (Col
Ohio	854	Warner Bros.	War	(War (Uni

Loew's	*2126*	*Loew's*	*31*
		UA	*17*
		Par	*30*

CLEVELAND, OHIO

Palace	3193	RKO	RKO	(Fox
Allen	3003	RKO	RKO	(Col
Hippodrome	3468	War	War	(RKO
Lake	800	War	War	(Uni (War

State	*3436*	*Loew's*	*23*
		UA	*4*
		Par	*14*
Stillman	*1813*	*Loew's*	*25*
		UA	*7*
		Par	*11*
Ohio	*1305*	*Loew's*	*16*
		UA	*4*
		Par	*9*

COLUMBUS, OHIO

RKO Palace	3013	RKO	RKO	(RKO (Fox ½ (Uni (War
" Grand	1200			

Ohio	*3079*	*Loew's*	*25*
		UA	*2*
		Par	*23*
		Col	*24*
		Fox	*9*

COLUMBUS, OHIO (Continued)

Theatre	Capacity	Operator	Affiliation	Product	
Broad	*2393*			*Loew's*	*19*
				UA	*7*
				Par	*14*
				Col	*18*
				Fox	*7*
				War	*5*

DAYTON, OHIO

Keith's	2698)			(Fox	
RKO Colonial	1709)	RKO	RKO	(Col	
State	1000)			(RKO	
				(Par	
				(Uni	
Victory	1416	Wm. Keyes	Independent	War	
Loew's	*2305*			*Loew's*	*27*
				UA	*8*

HARTFORD, CONN.

Allyn	1995	M & P	Par	Par	
Strand	1520	Warner	War	(UA	⅓
Regal	928	Warner	War	(War	
				(RKO	⅓
				(Uni	⅓
E. M. Loew's	1250	E. M. Loew	Independent	Col	
				Uni	⅓
State	3908	Harris	Independent		
Dow's	1293	Dow	Independent		
Poli	*3061*			*Loew's*	*31*
				UA	*3*
				Fox	*27*
				RKO	*20*
				Col	*2*
				Uni	*1*
Palace	*1719*			*Loew's*	*30*
				UA	*3*
				Fox	*26*
				RKO	*18*
				Col	*2*

HOUSTON, TEXAS

Theatre	Capacity	Operator	Affiliation	Product	
Metropolitan	2320)			(Par	
Majestic	2250)	Interstate	Par	(RKO	
Kirby	1464)			(Col	
				(Uni	
				(War	
				(Fox	
				(UA	
State	*2521*			*Loew's*	*27*
				UA	*8*

INDIANAPOLIS, IND.

Circle	2624			(War	
Indiana	3131	Dolle & Katz	Independent	(Par	
Lyric	1850			(Fox	
				(RKO	
				(Uni	
Keiths	1300	Keiths Op. Co.	Independent		
Loew's	*2446*			*Loew's*	*31*
				UA	*12*
				Col	*23*

JERSEY CITY, N. J.

Stanley	4332	Warner	War	(RKO	
				(War	
State	2168	Skouras	Independent	(Fox	
				(Col	⅓
				(Uni	
				(Par	
Loew's	*3187*			*Loew's*	*32*
				UA	*14*
				Col	*20*

KANSAS CITY, MO.

Theatre	Capacity	Operator	Affiliation	Product	
Orpheum	1538	RKO	RKO	(RKO (War	 ⅓
Newman	1800	Paramount	Par	Par War	 ⅓
Esquire Uptown Fairway Tower	800) 2043) 702) 2000)	Fox Midwest	Fox	(Uni (Fox	
Midland	*3573*			*Loew's* *UA* *Col* RKO	*32* *11* *31* *1*

LOUISVILLE, KY.

Rialto Strand	3063) 1865)	Dolle	Independent	(Uni (RKO (Par (Fox	
Mary Anderson	1147	Peo. Th. Co.	Independent	War	
Brown	1499	Dolle	Loew's*		
National	2310	Ind.	Independent		
State	*3274*			*Loew's* *UA* *Col* *RKO*	*31* *12* *37* *1*

MEMPHIS, TENN.

Malco Strand	2900) 1200)	Lightman (Malco)	Par	(UA part (Par (Col (Uni (RKO part	
Warner	2000	Warner Bros.	War	War	

*Loew's interest in this theatre has terminated.

MEMPHIS, TENN. (Continued)

Theatre	Capacity	Operator	Affiliation	Product	
State	*2550*			*Loew's*	*14*
				UA	*6*
				Fox	*11*
				RKO	*7*
Palace	*2154*			*Loew's*	*16*
				UA	*3*
				Fox	*12*
				RKO	*10*

NASHVILLE, TENN.

Paramount	**1862)**	**Sudekum**	**Independent**	**(Par**	
Knickerbocker	**1100)**			**(War**	
Princess	**1250)**			**(Fox**	
				(RKO	
Vendome	*1580*			*Loew's*	*27*
				UA	*7*
				Col	*6*
				Uni	*3*
				RKO	*6*

NEWARK, N. J.

Branford	2966	Warner	War	(War	
				(Uni	
				(Col	½
Paramount	1996	Adams	Par	Par	
Proctor's Palace	2233	RKO	RKO	(RKO	
				(Fox	
Adams	1900	Adams	Par		
State	*2589*			*Loew's*	*32*
				UA	*14*
				Col	*20*

NEW HAVEN, CONN.

Theatre	Capacity	Operator	Affiliation	Product	
Paramount	2353	M & P	Par	(Par	
				(Uni	½
Roger Sherman	2060	Warners	War	(War	
				(RKO	½
				(Uni	½
				(UA	½
Poli	*3008*			*Loew's*	*24*
				UA	*4*
				Col	*22*
				Fox	*24*
				RKO	*16*
College	*1499*			*Loew's*	*21*
				UA	*3*
				Col	*17*
				Fox	*26*
				RKO	*8*
Bijou	*1429*			*Loew's*	*9*
				Col	*17*
				Fox	*5*
				Par	*2*
				RKO	*9*
				UA	*2*
				Uni	*3*
				War	*1*

NEW ORLEANS, LA.

Saenger	3400)	Richards	Par	(Par	
Tudor	700)			(Fox	
Globe	532)			(War	½
Orpheum	2200	Singer	RKO	(RKO	
Liberty	1250	Singer		(Col	
				(War	½
				(Uni	
State	*3284*			*Loew's*	*27*
				UA	*4*
				Fox	*1*
				Uni	*2*

NEW YORK, N. Y.

Theatre	Capacity	Operator	Affiliation	Product	
Music Hall	5945	Radio City Music Hall	Ind.	(RKO (Loew's (Col, Fox	
Paramount	3664	Par	Par	Par	
Roxy	5850	Roxy Theatre Inc.	Fox	Fox	
Hollywood	1527	Warner	War	War	
Strand	2699	Stanley Mark	War	War	
Rivoli	2098	Biddle Realty Corp.	Par	(Par (Fox	
Rialto	594	Arthur Mayer	Independent		
Gotham	810	Brandt	"		
Globe	4270	"	"	Loew's	
Republic	1225	"	"		
Victoria	705	City Ent. Corp.	"		
Palace	1715	RKO	RKO	RKO	
Ambassador	1118	Siritzky	Independent		
Winter Garden	1250				
Capitol	*4560*			*Loew's*	*7*
				Uni	*2*
				Col	*1*
				UA	*3*
				RKO	*1*
*Criterion**	*1626*			*Loew's*	*1*
				Uni	*13*
				Col	*3*
				Par	*1*
				UA	*1*
*Astor**	*1135*			*Loew's*	*5*

NORFOLK, VA.

Norva	1719)	Fabian	Loew's**	Par	
Granby	1173)			Fox	
Newport	778	Wilder	Independent	(RKO	
Center	1600	"	"	(Uni	
				(Col	
Colly	780	"	"	(War	
State	*2069*			*Loew's*	*27*
				UA	*9*
				Par	*1*
				War	*1*

*Loew's interest in this theatre has terminated (L-13).

**Loew's interest in these theatres was limited to a pooling agreement with the Independent, Fabian. This pooling agreement has terminated.

PITTSBURGH, PA.

Theatre	Capacity	Operator	Affiliation	Product	
Stanley	3729)			(War	
Warner	1919)	Warner Bros.	War-Loew's*	(Par	⅓
Ritz	783)			(RKO	
Harris	2145)			(Col	
Senator	1840)	Harris	Independent	(Fox	⅔
				(Uni	⅓
Fulton	1800	Shea	Independent	Uni	⅓
				Fox	⅔
Barry	1740	Varsity Amus. Co.	Independent		

Penn	*3487*	*Loew's*	*14*
		UA	*1*
		Par	*11*
		RKO	*7*
		War	*9*

PROVIDENCE, R. I.

Fay's Majestic	2258)			(Fox	
Fay	1938)	Ed. Fay	Independent	(War	
				(Uni	⅓
Albee	2239	RKO	RKO	(RKO	
				(Uni	⅓
Strand	1500	Reed	Independent	Par	
				Col part	
Empire	1500	Independent			
Carlton	1439	Ed. Fay	Loew's		

State	*3232*	*Loew's*	*30*
		UA	*9*
		Col	*21*
		RKO	*1*
		Uni	*3*
		War	*1*

*Loew's interest in these three theatres was by way of pooling agreement. In accordance with the terms of the judgment of the District Court (Section III (2); R. 3698), this pooling agreement has been terminated. Of these three theatres Loew's today operates or has an interest in only the Ritz.

READING, PA.

Theatre	Capacity	Operator	Affiliation	Product
Embassy	2446	Fabian	Independent	(Fox
				(Par
Ritz	1228			(Col
Warner's	1261	Warner	War	War
Astor	2476	Jay Emanuel	Independent	(RKO
Park	1561			(Uni

Colonial	*1755*	*Loew's*	*27*
		UA	*10*
		Col	*1*
		Fox	*1*

RICHMOND, VA.

Colonial	1514			(Par
National	1528	Fabian	Loew's*	(UA part
				(War
State	700			(Col
Capitol	700	Thalheimer	Independent	(RKO
Byrd	1396			(Uni
				(Fox

Loew's	*2197*	*Loew's*	*27*
		UA	*9*
		War	*3*
		Par	*1*

ROCHESTER, N. Y.

Keiths Palace	2951			(War
Century	2135	RKO	RKO	(Par
Temple	1495	Comerford		(Fox
Regent	1592			(Col

Loew's	*3661*	*Loew's*	*29*
		UA	*8*
		Col	*34*
		Uni	*2*

*Loew's interest in these theatres was limited to a pooling agreement with the Independent, Fabian. This pooling agreement has terminated.

ST. LOUIS, MO.

Theatre	Capacity	Operator	Affiliation	Product	
Ambassador Fox Missouri St. Louis Shubert	3000) 5000) 3000) 3788) 1550)	Harry Arthur	Independent	(Par (Col (Fox (War (RKO (Uni	⅓
State	*3162*			*Loew's* *UA* *Col* *RKO* *Uni*	*27* *11* *35* *1* *2*
Orpheum	*1904*			*Loew's* *UA* *Col* *Par*	*34* *13* *27* *1*

SPRINGFIELD, MASS.

Capitol Art	1765) 955)	Warners	War	(War (UA (Uni (RKO	½ ½ ½
Paramount	2800	Goldstein	Par	(RKO (Par	½
Bijou	1100	Independent	Independent	(Col (Uni	½
Poli	*2611*			*Loew's* *UA* *Fox* *RKO*	*31* *10* *29* *4*

SYRACUSE, N. Y.

Keiths Paramount Eckel Empire	2514) 1493) 1446) 1171)	RKO-Schine	RKO	(Par (War (Uni (RKO (Fox	
State	*2902*			*Loew's* *UA* *Col* *RKO* *Uni*	*27* *11* *35* *1* *2*
Strand	*1600*			*Loew's* *UA* *Col* *RKO*	*38* *8* *33* *1*

TOLEDO, OHIO

Theatre	Capacity	Operator	Affiliation	Product	
Paramount	3408)			(Par	
Princess	940)	Balaban & Katz	Par	(Fox	
				(War	⅓
Rivoli	2455)			(RKO	
Pantheon	920)	Skirball	Independent	(Uni	
Granada	1274)			(Col	
				(War	⅓

Valentine	*1459*	*Loew's*	*32*
		UA	*7*
		Col	*1*
		RKO	*2*
Esquire	*887*	*Loew's*	*36*
		UA	*14*
		Col	*1*
		Fox	*1*
		RKO	*1*

WASHINGTON, D. C.

Earle	2218)			(War	
Metropolitan	2000)	Warners	War	(Par	⅓
				(Col	
Keiths	1500	RKO	RKO	(RKO	
				(Uni	

Capitol	*3434*	*Loew's*	*19*
		UA	*5*
		Par	*5*
		Fox	*13*
		RKO	*1*
		Uni	*2*
Palace	*2403*	*Loew's*	*10*
		UA	*1*
		Par	*4*
		Fox	*9*
Columbia	*1210*	*Loew's*	*24*
		Fox	*13*
		Par	*6*
		UA	*4*

WILMINGTON, DEL.

Theatre	Capacity	Operator	Affiliation	Product	
Warner Queen Grand	1785) 1449) 1314)	Warner	War	(Par (Col (Uni (War (RKO	
Rialto	732	Belair	Independent	Fox	
Aldine	*1783*			*Loew's* *UA*	*28* *9*

WORCESTER, MASS.

Warners	1334	Warner Bros.	War	(UA (RKO (Uni (War	⅓ ⅓ ⅓
Capitol	1898	M & P	Par	(Par (RKO (Uni	¼ ½
Poli	*3238*			*Loew's* *UA* *Col* *Fox* *RKO*	*33* *5* *28* *22* *8*
Elm St.	*2344*			*Loew's* *UA* *Col* *Fox* *RKO*	*26* *3* *27* *26* *10*

YONKERS, N. Y.

Proctors	2043	RKO	RKO	(RKO (Fox- (War (Uni	½
Loew's	*2616*			*Loew's* *Col* *Par* *Uni* *UA*	*36* *37* *28* *27* *15*

APPENDIX III.

LOEW'S FIRST-RUN THEATRES AND COMPETING FIRST-RUN THEATRES

in Cities of under 100,000 Population (6 in all)

EVANSVILLE, IND.

Theatre[1]	Capacity[1]	Operator[1]	Affiliation[2]	Product[3]	
Grand	Not in evid.)			(RKO	
Carlton	")	Fine Bros.	Independent	(War	
American	")			(Col*	
Victory	*2279*			*Loew's*	*22*
				UA	*6*
				Par	*23*
				Fox	*16*
				Uni	*22*
Majestic	*980*			*Loew's*	*9*
				UA	*10*
				Par	*11*
				Fox	*17*
				Uni	*28*
				War	*6*

HARRISBURG, PA.

Colonial	Not in evid.)			(War	
State	")	Fabian	Independent	(Par	
Rio	")			(Fox	
				(Col**	
Senate	"	Jay Emanuel	Independent	(RKO	
				(Uni	
Loew's	*1530*			*Loew's*	*28*
				UA	*10*
				War	*1*

Sources

1—Exh. L-17, 41, 42, 57, 82, 94, 126, 139, 365, 369.
2—Exh. 156-136, 359, 360.
3—Exh. L-17, 41, 42, 57, 82, 94, 126, 139, 365, 369.

*R. 2396.
**R. 2397.

MERIDEN, CONN.

Theatre	Capacity	Operator	Affiliation	Product	
Capitol	Not in evid.	Ricci	Independent	(RKO (War (Uni	½
Palace	*1666*			*Loew's* *UA* *Col* *Fox* *RKO ½* *Par*	*32* *13* *41* *29* *21* *23*
Poli	*1035*			*Operated Weekends Winter & Fall*	

NIAGARA FALLS, N. Y.

Strand Cataract	Not in evid.)	Hayman Estate	Independent	(Loew's (Col (RKO (Fox (Uni	
Bellevue	*1535*			*UA* *War* *Par* *RKO* *Loew's*	*14* *24* *31* *2* *2*

NORWICH, CONN.

Palace	1251*	Warner	War	(Col (Uni (RKO (Par (War	½
Poli	*822*			*Loew's* *Fox* *UA* *RKO*	*31* *34* *9* *20*

*Exh. RKO-11.

WATERBURY, CONN.

Theatre	Capacity	Operator	Affiliation	Product	
State	1954*	Warner	War	(Col	
				(Uni	
				(UA	
				(Par	
				(RKO	
				(War	
Poli	*3419*			*Loew's*	*28*
				UA	*5*
				Fox	*27*
				RKO	*11*
				Col	*2*
Strand	*1499*			*Loew's*	*25*
				UA	*11*
				Fox	*14*
				RKO	*5*
				Col	*4*
				Par	*1*
				Uni	*2*

*Exh. RKO-11.